Docket for 03-1395

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No. 03-1395
Title: George J. Tenet, Individually, Porter J. Goss, Director of Central Intelligence and Director of the Central Intelligence Agency, and United States, Petitioners

v.

John Doe, et ux.

Docketed: April 7, 2004
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (01-35419)
Decision Date: May 29, 2003
Rehearing Denied: January 7, 2004
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Apr 6 2004	Petition for a writ of certiorari filed. (Response due May 7, 2004)
Apr 6 2004	Appendix of George Tenet, Individually and as Director of Central Intelligence and Director of the Central Intelligence Agency, et al. filed.
Apr 15 2004	Order extending time to file response to petition to and including June 7, 2004.
Jun 7 2004	Brief of respondents John Doe and Jane Doe in opposition filed.
Jun 8 2004	DISTRIBUTED for Conference of June 24, 2004.
Jun 15 2004	Reply of petitioners George Tenet, Individually and as Director of Central Intelligence and Director of the Central Intelligence Agency, et al. filed. (Distributed)
Jun 28 2004	Petition GRANTED.
Aug 3 2004	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including August 31, 2004.
Aug 10 2004	Extension of time within which to file respondents' brief on the merits to and including November 19, 2004.
Aug 31 2004	Joint appendix filed.
Aug 31 2004	Brief of petitioners George Tenet, Individually, John E. McLaughlin, Acting Director of Central Intelligence and Acting Director of the Central Intelligence Agency, and United States filed.
Nov 12 2004	SET FOR ARGUMENT ON Tuesday, January 11, 2005.
Nov 12 2004	CIRCULATED.
Nov 17 2004	Brief of respondents John Doe and Jane Doe filed. (Distributed)
Dec 17 2004	Record received from U.S.C.A. 9th Circuit. (1 envelope)
Dec 17 2004	Record received from U.S.D.C. - Western Dist. of Washington. (1box)
Dec 22 2004	Reply of petitioners George Tenet, Individually, John E. McLaughlin, Acting Director of Central Intelligence and Acting Director of the Central Intelligence Agency, and United States filed. (Distributed)
Jan 11 2005	Argued. For petitioners: Paul D. Clement, Acting Solicitor General, Department of Justice, Washington, D.C. For respondents: David [illegible] Burman, Seattle, Wash.

Supreme Court, U.S.
FILED
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No. 031395

In the Supreme Court of the United States

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND UNITED STATES OF AMERICA, PETITIONERS

v.

JOHN DOE AND JANE DOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Totten* v. *United States*, 92 U.S. 105 (1875), bars a district court from considering respondents' due process and tort claims that the Central Intelligence Agency (CIA) has wrongfully refused to keep its alleged promise to provide them with life-time financial assistance in exchange for their alleged espionage services to the CIA.

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In the Supreme Court of the United States

No.

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND UNITED STATES OF AMERICA, PETITIONERS

v.

JOHN DOE AND JANE DOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-64a) is reported at 329 F.3d 1135.[1] The June 7, 2000, opinion of the district court (App. 95a-116a) is reported at 99 F. Supp. 2d 1284. The January 22, 2001, opinion of the district court (App. 85a-94a) is unreported.

JURISDICTION

The court of appeals entered its judgment on May 29, 2003. A petition for rehearing was denied on January 7,

[1] "App." refers to the separately bound appendix to the petition for a writ of certiorari.

2004 (App. 65a-66a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In *Totten* v. *United States*, 92 U.S. 105 (1875), this Court held that a suit against the United States could not be maintained to enforce the terms of an alleged agreement to perform espionage services. The Court found that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." *Id.* at 107. The Ninth Circuit in this case held that *Totten* did not bar respondents from bringing an action in federal district court seeking relief for an alleged failure of the Central Intelligence Agency (CIA or Agency) to compensate them for espionage activities they purportedly conducted overseas on behalf of the CIA.

1. Respondents, using the fictitious names Jane and John Doe, filed suit in the United States District Court for the Western District of Washington against the United States and the Director of Central Intelligence (DCI) in his individual and official capacity. The Second Amended Complaint alleges the following facts which the United States has neither confirmed nor denied "for reasons of national security." App. 2a. The CIA recruited respondents, husband and wife, to "conduct espionage for the United States" in a foreign country that was "then considered to be an enemy of the United States." *Id.* at 121a, 122a. Respondents agreed to spy for the CIA in exchange for a promise by the CIA to "arrange for travel to the United States and ensure financial and personal security for life." *Id.* at 122a. Respondents thereafter performed "highly dangerous

and valuable [espionage] assignments" abroad and ultimately defected to the United States and became United States citizens. *Id.* at 123a, 124a. John Doe subsequently obtained professional employment using a false name and resume. *Id.* at 124a. "As John Doe's salary increased over time, the [CIA's] living stipend decreased and eventually was discontinued." *Ibid.* A number of years later, John Doe lost his job due to a corporate merger and since has been unable to find employment. *Id.* at 125a.

The complaint also alleges that, if the CIA is "not compelled to resume assistance," respondents "will soon have no other choice than to leave the United States" and live in a foreign country where there is a risk that they will be recognized by individuals who are aware that there exist sanctions against them for death or imprisonment as a result of their espionage services for the CIA. App. 126a-128a. The complaint also alleges that respondents have unsuccessfully contacted the CIA for assistance. *Id.* at 129a-136a. The complaint seeks an injunction ordering the CIA to pay monthly "financial support" to respondents pending further administrative review by the CIA of their claims; a declaratory judgment specifying the kind of administrative review that would be required; and an order of mandamus that would compel the CIA to "provide for [respondents'] basic needs" and to adopt regulations for administrative review of their claims. *Id.* at 138a-142a.

2. The government moved to dismiss the complaint because respondents' claims were barred by this Court's decision in *Totten*, *supra*, and because the filing of the claims in district court was precluded by the Tucker Act, 28 U.S.C. 1491(a)(1), which provides for exclusive jurisdiction in the Court of Federal Claims for claims in excess of $10,000 "founded * * * upon any

express or implied contract with the United States." The district court denied the motion in part, holding that *Totten* does not extend to plaintiffs' tort and constitutional claims. App. 104a-107a. The district court also held that the Tucker Act does not apply to respondents' claims because they were framed in what the district court viewed as non-contract theories of a potential entitlement to benefits under statute, regulation, or estoppel. *Id.* at 107a. The court granted the government's motion to dismiss respondents' equal protection claim, *id.* at 113a-114a, and the court also denied respondents' motion for a preliminary injunction. *Id.* at 115a.

The government then moved for summary judgment and renewed its motion to dismiss, attaching a declaration of William H. McNair, the Information Review Officer for the CIA's Directorate of Operations, which is the Agency's Clandestine Service that conducts foreign intelligence and counterintelligence activities. App. 143a-148a. The district court denied summary judgment. *Id.* at 85a-94a. The district court then certified its orders for interlocutory appeal, and stayed further proceedings pending disposition of the government's appeal. *Id.* at 79a-84a. The court of appeals granted the government's petition for interlocutory appeal and denied respondents' cross-petition pursuant to 28 U.S.C. 1292(b). App. 77a- 78a.

3. A divided panel of the court of appeals affirmed. App. 1a-64a.

a. The majority held that the district court properly held that respondents' suit did not fall within the exclusive jurisdiction of the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491(a)(1). The court found that "[t]he primary claim of [respondents] * * * is for an injunction requiring the CIA to conduct in-

ternal hearings on their claims that comport with due process," App. 9a, and that respondents' due process claims allegedly arose from a liberty interest that was not dependent on the existence of any contract, *id.* at 11a-12a. The court also concluded that summary judgment was not proper on the issue whether respondents' due process claims arose from a statute or the CIA's regulations, because "further proceedings, including discovery," may provide support for a due process interest that exists independent of a contract. *Id.* at 15a. The majority similarly held the district court did not err in refusing to dismiss respondents' estoppel claim. *Id.* at 15a-17a. The court emphasized, however, that "this litigation is in a very early stage and full-fledged discovery has not yet begun," and that the CIA could accordingly file a renewed motion for summary judgment. *Id.* at 12a n.5.

The majority also held that *Totten* does not bar judicial review of respondents' claims at the outset because their claims, in the majority's view, "do not arise out of an implied or express contract." App. 18a. The majority believed that *Totten* is not a "blanket prohibition on suits arising out of acts of espionage," but "is instead simply a holding concerning contract law." *Id.* at 21a. Thus, the majority found that *Totten* holds only that, as a matter of contract law, a plaintiff could not recover on a claim for a secret contract for espionage services because bringing the action amounted to a breach of the contract that would necessarily preclude recovery. The court found that, "[f]or two reasons, the contractual holding of *Totten* is not applicable here." *Id.* at 22a. First, the court reasoned that respondents seek "to compel fair process and application of substantive law to their claims within the Central Intelligence Agency's . . . internal admini-

strative process." *Ibid.* The court stated that "a fair internal process could presumably proceed in accordance with the secrecy implicit in an agreement to engage in espionage." *Ibid.* (internal quotation marks omitted).

Second, the court found that, "[h]ere, [respondents] have so far proceeded in a manner that has not breached the agreement" by "fil[ing] suit under fictitious names and reveal[ing] only minimal, non-identifying details in their complaint." App. 22a. The court further reasoned that, "[w]ith court and government cooperation, it may be possible to continue the suit in a manner that avoids public exposure of any secret information." *Id.* at 23a.

The majority also concluded that *Totten*'s holding that public policy forbids a suit that would inevitably reveal information the law regards as secret "has flowered into the state secrets doctrine" as articulated in *United States* v. *Reynolds*, 345 U.S. 1 (1953). App. 25a. The majority then held that "*Totten* permits dismissal of cases in which it is asserted that the very subject matter is a state secret only *after* complying with the formalities and court investigation requirements that have developed since *Totten* within the framework of the state secrets doctrine." *Id.* at 27a; *id.* at 29a ("*Totten* is applicable to the case before us only as applied through the prism of current state secrets doctrine."). The court observed that the CIA "has not complied here with the formalities essential to invocation of the state secrets privilege," *i.e.*, a formal claim of privilege by the DCI after personal review of the matter. *Id.* at 31a. The court held that CIA's noncompliance with those formalities "is reason enough to affirm the district court's refusal to dismiss the case." *Ibid.*

The majority finally proceeded to "provide some guidance concerning the handling of [respondents'] claims should the state secrets privilege be invoked" by the CIA on remand. App. 31a. The majority instructed the district court to "make every effort to ascertain whether the claims in question can be adjudicated while protecting the national security interests asserted." *Id.* at 33a. The majority observed that "the district court might conclude that the Agency has not provided *any* basis for concluding that national security would be jeopardized by the revelation of the existence of a relationship with [respondents.]." *Id.* at 36a.

b. Judge Tallman dissented. App. 39a-64a. He explained that "*Totten* holds that claims brought by secret agents against the government are nonjusticiable," and only this Court, not the court of appeals, may "decide whether *Totten* continues to bar judicial review of actions arising from espionage services performed for the United States by secret agents." *Id.* at 39a (citation omitted).

4. The court of appeals denied rehearing and rehearing en banc. App. 65a-66a. Judge Kleinfeld, joined by five other active judges, dissented from the denial of rehearing. *Id.* at 66a-76a. He reiterated that "[t]he panel opinion effectively overrules *Totten*." *Id.* at 67a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision to let this case proceed to "full fledged discovery" (App. 12a n.5) absent a successful and formal invocation of a state secrets privilege by the DCI is inconsistent with this Court's decision in *Totten*. Since the CIA was created in 1947, the CIA has successfully used *Totten* to obtain dismissal *at the outset* of complaints alleging secret contracts to perform espionage services. That practice has

continue after the articulation of the state secrets doctrine in *United States* v. *Reynolds*, *supra*, and indeed has continued up until the decision below. The court of appeals' unprecedented holding, therefore, undermines the regime for dealing with claims of alleged espionage agents that has functioned effectively for nearly 130 years since *Totten*. That result seriously threatens to compromise the United States' foreign relations with other nations and to impair the ability of the CIA to conduct clandestine intelligence operations and to protect national security information from public disclosure. This Court's review is accordingly warranted.[2]

I. THE COURT OF APPEALS ERRED IN REFUSING TO APPLY *TOTTEN* v. *UNITED STATES*

Totten, 92 U.S. at 106-107, holds that overriding considerations of public policy, informed by separation of

[2] The United States does not seek review of the court of appeals' holding that, in the current posture of this case, the Tucker Act, 28 U.S.C. 1491(a)(1), does not require that respondents' constitutional claims be brought in the Court of Federal Claims. See App. 8a-17a. The United States does not take issue with that determination, but even if this Court took a different view, it would not preclude this Court from granting certiorari and reviewing the Totten issue. Certainly nothing in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), would preclude the Court from addressing the *Totten* issue without resolving the Tucker Act issue. See, *e.g.*, *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585 (1999). The Tucker Act issue is not jurisdictional in the Article III sense. See 5 U.S.C. 702. Moreover, the *Totten* doctrine necessarily must operate as a threshold basis for dismissing a suit. Indeed, in a case (and this may be such a case) where a plaintiff's standing depends on the existence of a secret contract or relationship with the CIA, the Court should dismiss the suit on *Totten* grounds without definitively resolving the question on which the plaintiff's standing depends. See p. 16, *infra*.

powers principles, forbid a suit against the United States that involves the disclosure of a secret agreement for espionage services. Respondents' suit seeks to force the CIA either to provide respondents with life-time financial assistance in compliance with an alleged contract (a contract with the CIA to perform espionage services) or to provide respondents with internal administrative procedures that would govern their entitlement to life-time financial support. App. 138a-142a. *Totten* bars this suit because respondents' claims cannot proceed without disclosing facts that would damage national security: whether respondents actually had an espionage relationship with the CIA and, if so, the details of that relationship.

A. *Totten* Bars A Court From Considering Claims That The CIA Has Wrongfully Refused To Pay For Espionage Services

1. *Totten* involved an action brought by the administrator of the estate of William A. Lloyd to recover compensation for espionage services behind Confederate lines that President Lincoln contracted for in 1861 during the Civil War. 92 U.S. at 105. The Court expressed its "objection" to the suit as inconsistent with the secret nature of the contract:

> The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter.

Id. at 106. The Court concluded that the secret "condition of the engagement was implied from the nature

of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties." *Ibid.*[3]

The Court further stated that the alleged failure to compensate a spy consistent with prior promises was not susceptible to judicial resolution. Such litigation presupposes a fact that would be confidential if true and therefore is not a proper subject of litigation: namely, the fact of the prior promise. Adjudication of such disputes not only would prevent effective foreign relations, but also would interfere with the government's ability to contract for espionage services in the first place. "A secret service, with liability to publicity in this way, would be impossible." *Totten*, 92 U.S. at 107. The Court thus articulated the "general principle[] that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards

[3] The importance of secrecy was not a novel concept at the time President Lincoln contracted for espionage services. Since the earliest days of the Republic, secrecy has been recognized as vital to the successful gathering of intelligence. In a letter of July 26, 1777, issuing orders for an intelligence mission, George Washington wrote to Colonel Elias Dayton:

> The necessity of procuring good intelligence, is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprises of the kind, and for want of it they are generally defeated.

The Writings of George Washington 478-479 (J. Fitzpatrick ed. 1933); see *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

as confidential, and respecting which it will not allow the confidence to be violated." *Ibid.*

Totten establishes that suits to obtain judicial relief for the CIA's allegedly wrongful failure to compensate spies are "non-justiciable," because such suits cannot proceed without acknowledgment of an espionage relationship. App. 39a (Tallman, J., dissenting); accord *id.* at 67a (Kleinfeld, J., dissenting) ("Under *Totten*, those who spy for us cannot bring lawsuits to enforce our intelligence agencies' promises, because that would require exposure of matters that must be kept secret in the interest of effective foreign policy.").

2. *Totten* also reflects the broader principle that certain matters touching upon foreign affairs and national security are not appropriate for judicial resolution because they are committed to the discretion of the Executive Branch. See generally *Baker* v. *Carr*, 369 U.S. 186, 211-217 (1962). "Implicit in the Court's public policy holding [of *Totten*] is an understanding that fundamental principles of separation of powers prohibit judicial review of secret contracts entered into by the Executive Branch in its role as guardian of national security." App. 41a (Tallman, J., dissenting). A suit that would compel the United States to disclose the existence and the details of an espionage relationship would be an inappropriate intrusion into the Executive Branch's authority over foreign affairs and national security. Moreover, the extent of any remedy for an alleged spy is a matter uniquely for the Executive Branch. As this Court noted in *Totten*, such individuals "must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award." 92 U.S. at 107.

The protection of intelligence sources and methods is constitutionally entrusted to the Executive Branch under Article II of the Constitution. The President is "vested" with the "executive Power" as the head of the Executive Branch, and is also the "Commander in Chief of the Army and Navy of the United States." U.S. Const. Art. II, § 1, Cl. 1, § 2, Cl. 1. That "constitutional investment of power in the President" necessarily includes the "authority to classify and control access to information bearing on national security." *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988). The President's authority to control access to classified information "exists quite apart from any explicit congressional grant." *Ibid.*

In addition, Congress has specifically charged the DCI with protecting intelligence information from disclosure. See, *e.g.*, 50 U.S.C. 403-3(c)(6) (DCI shall "protect intelligence sources and methods from unauthorized disclosure"); 50 U.S.C. 403-3(d)(1)-(5) (authorizing DCI to collect human intelligence and perform other intelligence functions and duties concerning the national security); *CIA* v. *Sims*, 471 U.S. 159, 168-169 (1985) (Congress entrusted the CIA with "very broad" and "sweeping power" to protect "all sources of intelligence information from disclosure").

Applying *Totten* to force individuals to "look for their compensation" from "the department employing them" does not strip human intelligence sources of potential remedies. For instance, sources can raise their disputes with the CIA's Office of Inspector General. Finally, because human sources are essential to collecting intelligence, the CIA has an obvious incentive to preserve its reputation of being fair and of honoring commitments to its sources. App. 75a (Kleinfeld, J., dissenting).

B. Respondents' Claims Are Governed By *Totten*

1. Because respondents' suit arises out of, and depends upon, a classified fact—respondents' alleged agreement with the CIA to perform espionage services—*Totten* requires the dismissal of the complaint. As Judge Kleinfeld's dissenting opinion explained:

> [Respondents'] case is factually indistinguishable from *Totten*. Like William Lloyd, [respondents allegedly] were engaged to provide secret service to the United States behind enemy lines. Like Lloyd, they served to the great benefit of the United States in circumstances that could have gotten them killed. And like Lloyd, they allegedly got stiffed by the government providing less compensation than required by the contracts when the time came for the United States to pay up.

App. 69a. And like Lloyd, respondents are seeking a judicial order that would require an adjudication of whether respondents in fact had an espionage relationship, and if so, any extent to which that relationship imposes an obligation on the United States. Thus, like Lloyd's suit, respondents' suit would interfere with the government's ability to protect classified information and to conduct espionage relationships while maintaining effective foreign relations.

In refusing to dismiss the suit in this case, the court of appeals held that *Totten* does not require the dismissal of claims that did not seek enforcement of a contract. App. 21a-25a. The Court's holding and reasoning in *Totten*, however, extend beyond contractual claims. The Court looked to the secret nature of the underlying relationship, emphasizing that "the employment and the service were to be equally concealed" and that "[t]he secrecy which such contracts impose pre-

cludes *any action* for their enforcement." *Totten*, 92 U.S. at 106, 107 (emphasis added); *id.* at 107 ("public policy forbids the maintenance of *any* suit in a court of justice") (emphasis added). The Court that decided *Totten* certainly would not have entertained a tort suit for the tortious interference with an espionage contract, or any other action that proceeded on the premise that a secret promise or contract, in fact, existed.

Totten equally "extends to claims for tort or constitutional violations arising from the secret contractual relationship." App. 49a (Tallman, J., dissenting). "Whether it is called a plea for fairer process or a simple contract claim for damages, [respondents], like Totten's decedent, sue the government to obtain a remedy for its breach of an agreement to compensate them for intelligence services." *Id.* at 71a (Kleinfeld, J. dissenting). Thus, "the *Totten* doctrine applies to the facts of this case regardless of whether [respondents'] claim is based on a secret contract with the CIA or on other theories of relief that necessarily involve the disclosure of that secret relationship." *Id.* at 52a (Tallman, J., dissenting). The majority's contrary reading of *Totten* would allow past or current spies (or individuals who imagine or allege that they were spies) to circumvent *Totten* by artificially pleading contract claims as raising tort or constitutional claims.[4]

[4] The majority erred in relying (App. 33a-35a) on *Webster* v. *Doe*, 486 U.S. 592, 604-605 (1988), which held that a discharged covert CIA employee could assert constitutional challenges to his dismissal from the Agency. As long as a covert CIA employee's name is not identified, certain aspects of his or her activities (*e.g.*, the case officer's GS pay rank) can be revealed or litigated without necessarily exposing classified information. The CIA also, of course, can assert the state secrets privilege with respect to any classified information relevant to the lawsuit. By contrast, beyond the general unclassified fact that covert CIA employees use human sources for intelligence, there is generally no aspect of any espionage relationship that can be revealed or litigated, including confirmation or denial of any relationship, that does not involve exposure of classified information. See App. 59a (Tallman, J., dissenting). In all cases, the facts that underlie an espionage relationship are classified such that a lawsuit cannot proceed under any circumstance. See pp. 24-26, *infra*.

All of respondents' claims, at bottom, are inexorably linked to, and premised on, the alleged existence of a secret agreement to perform espionage services, and "the judicial branch cannot right such a wrong without disclosure of the engagement's existence, which, as *Totten* said, must remain forever secret." App. 75a (Kleinfeld, J., dissenting). For instance, "[a]s with a claim sounding strictly in contract, [respondents'] claim based on theories of estoppel would require [respondents] to actually demonstrate a relationship with the CIA," "the very existence" of which is "a secret that cannot be disclosed, since disclosure of this fact would inevitably 'compromise or embarrass our government in its public duties.'" *Id.* at 52a (Tallman, J., dissenting) (quoting *Totten*, 92 U.S. at 106). The same is true of respondents' due process claims that are allegedly based on a statute or regulation. "That is, [respondents] would have to show that a relationship or an agreement existed between themselves and the CIA that would entitle them to seek relief under these specific statues and regulations for the benefits they now claim." App. 53a (Tallman, J., dissenting). In sum, absent an alleged secret relationship between respondents and the CIA, the latter owes no actionable duty to the former.

The panel was manifestly wrong in asserting that a suit to compel the Agency to provide respondents with

a "fair internal process" could comport with the secrecy implicit in respondents' alleged relationship with the CIA. App. 22a. A judicial order of that sort would necessarily be premised upon a finding that respondents were in fact spies entitled to a "fair internal process." *Ibid.* Absent such a relationship, they would not even have standing to seek a fair process. Indeed, the majority explicitly acknowledged that "to make out their procedural due process claim, [respondents] will need to demonstrate * * * that they had a relationship with the CIA that could potentially establish an entitlement to continued assistance or payments." App. 35a; accord *id.* at 37a (requiring district court to engage in "evidentiary inquiry * * * whether the alleged relationship with the CIA in fact existed, and, if so, whether the resulting relationship gave rise to a legally cognizable property or liberty interest").

In short, respondents' suit in its entirety conflicts with respondents' allegedly secret relationship with the United States and the public policy that suits by spies compromise national security and effective foreign relations. If anything, respondents' suit imposes even more of an intrusion on the Executive Branch's role in safeguarding national security than that imposed by William Lloyd's suit for compensation. Here, respondents seek not only an injunction for financial support or to "provide for [their] basic needs," App. 138a, but also seek a judicial determination of what procedures the CIA must have to adjudicate "defector grievances," *id.* at 139a.[5]

[5] Indeed, because anyone agreeing to provide espionage would know that such a contract would not be judicially enforceable, they may seek certain assurances about the extent to which the Agency will provide a fair process to review any dispute. But that aspect of the alleged agreement is no more subject to judicial review than the terms of payment.

2. The court of appeals concluded that the *Totten* doctrine has effectively been subsumed under the state secrets doctrine under *United States* v. *Reynolds*, 345 U.S. 1 (1953). App. 25a-29a. This Court's decision in *Reynolds* itself, however, refutes that notion. The Court in *Reynolds* cited *Totten* expressly, and differentiated it from an ordinary dispute in which the evidentiary state secrets privilege is necessary to protect information that might be relevant to some degree in resolving claims otherwise susceptible of judicial resolution. As this Court explained, *Totten*, by contrast, was a case "where the very subject matter of the action, a contract to perform espionage, was a matter of state secret. The action was dismissed on the pleadings without ever reaching the question of evidence, since it was so obvious that the action should never prevail over the privilege." *Reynolds*, 345 U.S. at 11 n.26. Contrary to the Ninth Circuit's reading, that passage makes eminently clear that *Totten*'s rule of dismissal does not require formal invocation of the state secrets privilege.

"*Reynolds* did not alter the long-standing rule announced in *Totten* barring judicial review where the very subject matter of the suit is a state secret." App. 44a (Tallman, J., dissenting). The *Totten* doctrine and *Reynolds* privilege are complementary, not mutually exclusive. As Judge Tallman's dissent correctly explained:

> While *Totten* and *Reynolds* are closely related in that both protect a state secret from disclosure, the rules announced in those cases differ in subtle but important respects. Most importantly, the state

> secrets privilege in *Reynolds* permits the government to withhold otherwise relevant discovery from a recognized cause of action (*e.g.*, [a Federal Tort Claims Act] case), while the *Totten* doctrine permits the dismissal of a lawsuit because it is nonjusticiable before such evidentiary questions are ever reached.

Ibid.

This Court's post-*Reynolds* decision in *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146 (1981), also reaffirms *Totten*. In that case, the Court held that "whether or not the Navy has complied with [the National Environmental Policy Act, 42 U.S.C. 4332(2)(C)]" with respect to the storage of nuclear weapons at a Navy facility was "beyond judicial scrutiny." 454 U.S. at 146. The Navy's obligation under the Act, the Court explained, was triggered by a proposal to store nuclear weapons. Because any such proposal would itself be classified information, the Court held that, under *Totten*, the suit could not proceed. *Id.* at 146-147. Similarly, because any obligation of the CIA to respondents would be triggered by a classified fact, *i.e.*, the existence of an espionage relationship with the CIA, *Totten* categorically bars respondents' suit.

II. THIS COURT'S REVIEW IS WARRANTED TO REAFFIRM *TOTTEN*'S CONTINUING VALIDITY

Totten is of vital importance to the CIA's ability to carry out espionage activities and to protect classified information from unauthorized disclosure. The Ninth Circuit's holding that *Totten* does not bar suits such as respondents' warrants this Court's review.

A. This Court's Review Is Necessary To Correct The Ninth Circuit's Holding That *Reynolds* Superseded *Totten*

1. The majority held in this case that *Totten* "has flowered into the state secrets doctrine of today," such that "*Totten* permits dismissal of cases in which it is asserted that the very subject matter is a state secret only *after* complying with the formalities and court investigation requirements that have developed since *Totten* within the framework of the state secrets doctrine." App. 25a, 27a; *id.* at 31a (holding that failure to formally invoke state secret privilege "is reason enough to affirm the district court's refusal to dismiss this case"). As Judge Kleinfeld, joined by five other judges, stated, "[t]he panel opinion effectively overrules *Totten*." *Id.* at 67a.

Only this Court, however, may overrule its precedent; a court of appeals cannot accomplish the same result through reliance on later decisions of this Court. *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997). This Court, of course, has never overruled *Totten* and has continued to recognize its force long after *Reynolds*. Thus, "[i]t is the prerogative of the Supreme Court, not [the Ninth Circuit], to decide whether *Totten* continues to bar judicial review of actions arising from espionage services performed for the United States by secret agents, or whether the *Totten* doctrine has somehow been supplanted by the modern state secrets evidentiary privilege articulated in *Reynolds*." App. 39a (Tallman, J., dissenting) (citations omitted); accord *id.* at 67a (Kleinfeld, J., dissenting). This Court's review is accordingly warranted to clarify that *Totten* bars suits that arise out of a secret agreement to perform espionage services for the CIA.

2. The panel's interpretation of *Totten* also conflicts with the decision of the Federal Circuit in *Guong* v. *United States*, 860 F.2d 1063 (Fed. Cir. 1988), cert. denied, 490 U.S. 1023 (1989). In that case, the court of appeals dismissed under *Totten* a suit brought by an alleged covert saboteur for the CIA, and rejected the plaintiff's contention that the suit could proceed because the CIA could assert the state secrets privilege under *Reynolds*. *Id.* at 1064-1066. The court of appeals reasoned that *Reynolds* "does not limit or modify the authority of *Totten* or its rationale," and that the plaintiff's suit could not proceed without acknowledgment of a covert relationship with the CIA. *Id.* at 1066.

The panel's decision squarely conflicts with the *Guong* court's conclusion that *Totten* continues to have independent significance after this Court's decision in *Reynolds*. Moreover, in sharp contrast to *Guong*, the panel's decision specifically contemplates that respondents may adjudicate whether they in fact spied for the CIA. App. 35a, 37a. The conflict between the panel's decision and *Goung* over whether *Reynolds* supersedes *Totten* warrants this Court's review.

B. *Totten* Is Of Paramount Importance To The National Security And Foreign Relations Interests Of The United States

1. The issue of whether *Totten* has continuing validity is of critical importance to the United States's ability to conduct foreign intelligence activities in support of its national security, counterterrorist, and foreign policy objectives. At "the heart of all intelligence operations" is the CIA's sources and methods of intelligence, particularly those relating to spies. *CIA* v. *Sims*, 471 U.S. at 167. Clandestine intelligence operations demand special protection to ensure that intelligence sources are not compromised and that diplomatic policies are not embarrassing to the United States. Inadequate protection of such information would render the CIA "virtually impotent." *Id.* at 170; see *id.* at 175 ("[F]orced disclosure of the identities of [the CIA's] intelligence sources could well have a devastating impact on the Agency's ability to carry out its mission."). This Court accordingly has recognized that the CIA "has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *CIA* v. *Sims*, 471 U.S. at 175 (quoting *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam)); see *Egan*, 484 U.S. at 527.

Secrecy in all aspects of the CIA's espionage activities is necessary in order to protect the lives of the spies as well as the CIA employees who recruit them. "The continued availability of [intelligence] sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger the[ir] personal safety." *Snepp*, 444 U.S. at 512. "Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.'" *CIA* v. *Sims*, 471 U.S. at 175. Additionally, the CIA's covert operations are designed to acquire secrets of foreign countries in order to protect the life and liberty of United States citizens.

That reality has led to the long-standing principle reflected in *Totten* that contracts for espionage are inherently secret, and are not a proper topic for public disclosure or litigation. Inherent in the process is the possibility that one party will deny any relationship with the other. See, *e.g.*, 1 *Oppenheim's International*

Law § 455, at 862. (H. Lauterpecht ed., 8th ed. 1955) ("Although all States constantly or occasionally send spies abroad, and although it is not considered wrong morally, politically, or legally to do so, such agents have, of course, no recognised position whatever according to International Law, since they are not official agents of States for the purpose of international relations. * * * A spy cannot legally excuse himself by pleading that he only executed the orders of his Government, and the latter will never interfere, since it cannot officially confess to having commissioned a spy."); Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 Am. J. Int'l L. 53, 70 (1984) ("For acts of espionage, a 'true' spy, acting in disguise or under false pretenses, is himself responsible: he is out in the cold by himself and the sending state will most likely disavow any knowledge of him."). As the possibility of denial is inherent in and vital to the relationship, a party to an alleged contract for espionage has no basis to demand an adjudication premised on the existence of the contract. Permitting such actions threatens our ability to conduct effective foreign relations. "Spying is among the 'matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties.'" *Id.* at 72a (quoting *Totten*, 92 U.S. at 106). *Totten* is therefore essential to CIA's ability to carry out espionage activities in secret.

2. Since its inception over a century ago, the *Totten* doctrine has deterred lawsuits by individuals who have real or perceived grievances against the United States arising out of an alleged relationship for the performance of espionage. *Totten* also has greatly preserved the CIA's resources and prevented efforts at "graymail," *i.e.* attempts by individuals to induce the Agency

to settle a case (or prevent a case from being filed) out of a concern that litigating the suit would reveal sensitive or classified information useful to our adversaries or that would compromise the Agency's clandestine operations. *Totten* significantly reduces the effectiveness of graymail by eliminating lawsuits by alleged spies at the earliest stage of litigation. The panel's unprecedented holding that such suits are not barred at the outset and may even proceed to judgment runs the real risk that such lawsuits would substantially increase. Indeed, the expected enormous publicity that may be generated by the assertion of a state secrets privilege by the DCI in any given case could well force the CIA to settle the case, regardless of its merits.

C. Requiring The CIA To Assert The State Secrets Privilege With Respect To Specific Information Does Not Sufficiently Safeguard The CIA's Interests

1. The Ninth Circuit's holding that this case could proceed unless and until the DCI successfully asserts the state secrets privilege significantly reduces the benefits to the CIA from *Totten*'s categorical bar of suits by spies arising out their relationship with the CIA. *Totten* protects against potentially devastating disclosures of national security information, discourages lawsuits from being filed in the first place, and prevents the judiciary from reviewing what is a quintessentially core Executive Branch function. Those benefits are in large measure lost if the CIA must undergo "full-fledged discovery" (App. 12a n.5) and become embroiled in a case-by-case battle over the propriety of asserting a state secrets privilege with respect to individual documents or pieces of information. Such a regime would also place an enormous burden on the DCI, whose attention would be diverted from the CIA's

other pressing business to reviewing potentially every pleading filed by an alleged spy with a grievance against the Agency.

At a more fundamental level, however, the Ninth Circuit's holding seriously misconceives *Totten*'s protection of the classified fact of whether the United States has contracted for espionage services. As discussed (at 15-16), all of respondents' claims depend upon the existence of an espionage relationship whose very existence must "for ever" remain secret. *Totten*, 92 U.S. at 106. The possibility of a formal adjudication confirming the relationship is fundamentally inconsistent with the nature of the relationship and the bargain struck. The "most important purpose" served by the *Totten* rule is "to keep the whole engagement utterly and entirely secret." App. 71a (Kleinfeld, J., dissenting). "If a lawsuit is filed but some papers remain secret, that is not enough. An intelligent observer, knowing something of the events, can figure out from the barest indications in a lawsuit what it is all about." *Id.* at 72a (Kleinfeld, J., dissenting). And knowing information about one spy—where he works, what cover he had, and the like—can reveal sensitive information about CIA's tradecraft with respect to other spies and covert operations.

Moreover, because the existence *vel non* of an espionage agreement is itself a classified fact, invocation of a state secrets privilege in every case by the DCI would be an entirely unnecessary exercise. *Reynolds*, 345 U.S. at 11 n.26. Significantly, "[e]ven asserting that there is a secret to protect * * * amounts to letting the cat out of the bag. It is such disclosure of the relationship's very existence that *Totten* sought to avoid." App. 72a. The same is equally true "where there is no espionage relationship to protect," in which

case any statement to that effect would "make all non-denials effectively confirmations." *Ibid.* With respect to this case, William H. McNair, the Information Review Officer within the CIA's directorate for foreign intelligence and counterintelligence activities, explained that any official acknowledgment of the truth or falsity of any of respondents' allegations would reveal information that could compromise national security:

> [A]ny Agency response to the factual assertions made in any of [respondents'] pleadings, whether to either confirm or deny the allegations contained therein, would be classified information and could not be filed in open court. * * * [W]hen such allegations are either confirmed or denied by the Agency * * * they then bear the imprimatur of an official statement, at which point, * * * national security issues would be raised and the matters would become classified.[ ]
>
> * * * [T]he denial of a relationship would itself reveal classified information. * * * If the CIA were to deny a relationship every time one did not exist, then any time the Agency refused to confirm or deny a relationship, it would be tantamount to an admission that such a relationship does in fact exist. Such a procedure would obviously reveal the very information that the CIA seeks to protect (i.e. a current or past covert relationship) and would risk national security.

Id. at 147a & n.1; see Exec. Order No. 12,958, § 1.2(4), 3 C.F.R. 333 (1996), as amended by Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (2003) (requiring classification of information the disclosure of which "reasonably could be expected to result in damage to the national security").

2. The panel fundamentally disagreed with the CIA's assessment that even responding to respondents' allegations was a national security risk. Thus, the panel questioned the CIA's need at the outset to obtain dismissal of suits arising out of an espionage agreement and held that the CIA is compelled in every case to demonstrate harm to national security from official confirmation of whether a plaintiff was a spy for the CIA. Thus, the panel held that district court was permitted to engage in an "evidentiary inquiry * * * to determine whether the alleged relationship with the CIA in fact existed and, if so, whether the resulting relationship gave rise to a legally cognizable property or liberty interest." App. 37a; accord *id.* at 35a. The panel also repeatedly suggested that suits that allege an espionage relationship with the CIA may not jeopardize national security. *Id.* at 35a-36a. The panel therefore invited the district court "to second guess the DCI's determination of what information remains harmful to national security or [is] otherwise embarrassing to the federal government," *id.* at 54a (Tallman, J., dissenting). Judges are ill-suited, however, to make the "complex political, historical, and psychological judgments" that factor into the DCI's assessment of what revelations could damage national security. *CIA* v. *Sims*, 471 U.S. at 176.

For example, the panel speculated that the CIA could acknowledge whether respondents were in fact spies without necessarily harming national security because "[i]t is widely known that * * * the CIA recruits foreign spies" and because allegations in the complaint "could be evidence that [respondents'] past relationship with the CIA is not now clandestine." App. 35a, 36a. But "even if a fact * * * is the subject of widespread media and public speculation, its official acknowledgment by an authoritative source might well be new information that could cause damage to the national security." *Afshar* v. *Department of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983); *Military Audit Project* v. *Casey*, 656 F.2d 724, 745 (D.C. Cir. 1981); accord *Abbots* v. *NRC*, 766 F.2d 604, 607-608 (D.C. Cir. 1985).

Another example is the panel's mistaken perception that it is relevant that "[a] substantial time has passed since the agreement with [respondents] was formed, and we are no longer 'at war,' 'cold' or otherwise, with [respondents'] country of origin." App. 36a. The end of the Cold War, and the passage of time generally, do not detract from the CIA's need to protect all aspects of its tradecraft methods in spotting, developing, recruiting, rewarding, and terminating human intelligence sources. "The *Totten* case was decided over ten years after the end of the Civil War, and whatever military secrets Totten might have uncovered during the war were certainly not current military secrets in 1875." *Guong*, 860 F.2d at 1065. As *Totten* itself stated: "Both employer and agent must have understood that the lips of the other were to be *for ever* sealed." 92 U.S. at 106 (emphasis added). Because the Ninth Circuit's decision to remand this case for further proceedings conflicts with *Totten* and seriously undermines the CIA's ability to protect classified information and conduct espionage operations, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No.

In the Supreme Court of the United States

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY AND UNITED STATES OF AMERICA, PETITIONERS

v.

JOHN DOE AND JANE DOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-35419

JOHN DOE AND JANE DOE, PLAINTIFFS-APPELLEES

v.

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

[Argued and Submitted Feb. 7, 2002
Filed: May 29, 2003]

OPINION

Before: CANBY, JR., BERZON,* and TALLMAN, Circuit Judges.

BERZON, Circuit Judge:**

Jane and John Doe—fictitious names, adopted for this litigation for reasons that will appear—assert that they performed espionage activities on behalf of the

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* Pursuant to General Order 3.2g, Judge Berzon was drawn to replace Judge Henry A. Politz. Judge Berzon has read the briefs, reviewed the records, and listened to the tape of oral argument.

** Part II of the opinion is authored by Judge Canby.

United States against a former Eastern bloc country. The Central Intelligence Agency (the "CIA"), they say, assured them that it would provide assistance in resettling in the United States as well as lifetime financial and other support. According to the Does, the CIA has now reneged on its obligation of support. The United States will neither confirm nor deny the Does' allegations, for reasons of national security.

We must decide whether the Does can sue the CIA for the alleged wrongs committed by the Agency, or whether, instead, their action is either appropriate only in the Court of Federal Claims or precluded by the venerable doctrine enunciated in *Totten* v. *United States*, 92 U.S. 105, 23 L. Ed. 605 (1875).

I

We assume, without deciding, that the facts as alleged by the Does are true and construe the complaint in the light most favorable to their case. See *Burgert* v. *Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000). The facts that appear in this opinion, with the exception of procedural history in federal court, are all, therefore, simply allegations, even when not stated as such.

The Does allege that they were citizens of an Eastern bloc country formerly considered an adversary of the United States. During his tenure as a high ranking diplomat for that country during the Cold War, Mr. Doe approached a person associated with the United States embassy and requested assistance in defecting to the United States.

The Does recount that after this request was made, CIA agents took them to a "safe house" for approximately twelve hours. The CIA officers employed intimidation and coercion to convince the Does to remain instead at their diplomatic post and to engage in espionage for the United States. The agents told the Does that if they agreed to conduct espionage on behalf of the United States, the CIA would arrange for their resettlement in the United States and ensure their financial and personal security "for life." The Does further allege that the agents assured them that this assistance was approved at the highest level of authority at the CIA and was mandated by U.S. law.

The Does state that although they were initially reluctant to conduct espionage activities, they eventually agreed to do what was asked of them. They allege that they carried out their end of the bargain but that the Agency has now reneged and abandoned them to fend for themselves.

The Does represent that they entered the United States under the special provisions of the "PL-110 Program."[1] Pursuant to that program, the CIA provided

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[1] PL-110 refers to the original public law number of the Central Intelligence Act of 1949. As used by the parties to this litigation, PL-110 refers to an alleged program emerging from a section of that statute, now codified at 50 U.S.C. § 403h:

> Whenever the Director [of Central Intelligence], the Attorney General, and the Commissioner of Immigration and Naturalization shall determine that the admission of a particular alien into the United States for permanent residence is in the interest of national security or essential to the furtherance of the national intelligence mission, such alien and his immediate family shall be admitted to the United States for permanent residence without regard to their inadmissibility under the

them with false identities and backgrounds and offered to "retire" them with financial and health benefits. The Does allege that the Agency provided them with various benefits, including health care and education. Because the Does desired to "become integrated into American society," they requested that the CIA assist them in obtaining employment. They claim that the CIA continued to assure them that, to the extent that their earned income was insufficient to meet their needs, they would be supported by the Agency for the remainder of their lives with a "safety net," which was "required by law." The Does allege that they were told that such support was required on the basis of their classification as "PL-110s."

The Does eventually settled in the Seattle area, and were initially provided with a stipend of $20,000 per year, as well as housing and other benefits. Over time, their stipend was increased to $27,000. They say that with the CIA's assistance in providing false identities, resumes, and references, Mr. Doe obtained professional employment in 1987. As Mr. Doe's salary increased, the amount of the stipend provided by the CIA commensurately decreased.

In 1989, Mr. Doe and the CIA allegedly agreed that once Mr. Doe's salary hit the $27,000 mark, his stipend would be suspended. However, Mr. Doe received the CIA's assurance that if his employment were termi-

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immigration or any other laws and regulations, or to the failure to comply with such laws and regulations pertaining to admissibility: Provided, That the number of aliens and members of their immediate families admitted to the United States under the authority of this section shall in no case exceed one hundred persons in any one fiscal year.

nated, his stipend would be resumed. The CIA assertedly assured Mr. Doe that the Agency would "always be there" for the Does.

As a result of a corporate merger in 1997, Mr. Doe lost his job. Although Mr. Doe made efforts to find new employment, he says that his advanced age and his security arrangement with the CIA, which required him to use the false identity and background that he had been provided, limited his options. The Does assert that they contacted the CIA to request assistance. The CIA refused to assist Mr. Doe in finding a new job as it had done in the past. Mr. Doe has remained unemployed. After several failed attempts to obtain CIA assistance, the Does sought legal representation.

In 1997, the Does were allegedly informed by a CIA representative that the Agency had determined that the benefits they had previously been provided had been adequate compensation for the services rendered and that further support would not be provided. The Does were then told that they could appeal this decision to the Director. The Does' counsel therefore prepared an appeal to the Director. While so doing, the Does' counsel repeatedly requested from the Agency internal regulations governing the appeals process as well as regulations regarding resettled aliens. The CIA never responded to these requests. Other requests for access to records or individuals within the CIA were also either denied or ignored by the CIA.

Nevertheless, the Does claim, they filed their administrative appeal with the Director in late 1997. It was subsequently denied. The Does assert that they then appealed to the Helms Panel, a panel consisting of former Agency officials. The Does allege that the

Helms Panel recommended that the Agency provide the plaintiffs "certain benefits . . . for a period not to exceed one year, and nothing thereafter." The payment was conditioned on the Does' signing waivers and release documents. Apparently, the Does declined to execute such documents and therefore did not receive the payments recommended by the Helms Panel.

The Does then filed suit in the United States District Court for the Western District of Washington. They asserted claims under the Equal Protection and Due Process Clauses of the United States Constitution, seeking declaratory, injunctive, and mandamus relief. Their complaint further requested that the district court require the CIA to resume payment of the benefits allegedly promised and provide constitutionally adequate internal review procedures.

The United States moved to dismiss the case for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The district court denied the CIA's jurisdictional motion under Rule 12(b)(1), finding that the rule announced by the Supreme Court in *Totten* did not prohibit the court from entertaining this suit. The district court determined that the trial could proceed despite the alleged existence of a secret agreement, and any materials involving national security interests ~~could~~ be adequately protected by submission under seal or by *in camera review*.

The district court also rejected the CIA's contention that the Tucker Act, 28 U.S.C. § 1346, requires that this case be heard in the United States Court of Federal Claims, because, according to the Agency, this was

essentially a contract suit seeking money damages from the United States. The district court reasoned that although the Does' request for injunctive relief may have included a directive that the CIA resume payments, the Does were not seeking solely a money damages judgment.

The district court went on to determine that the Does had properly stated both substantive and procedural due process claims, even apart from the existence of an alleged secret contract with the Agency. First, the district court found that "[the Does] may be able to base their entitlement to receipt of the CIA's monetary stipend on theories other than contract. For example, if plaintiffs are able to prove an entitlement to benefits based on a promissory or equitable estoppel theory, or if there is a regulatory or statutory basis for their entitlement, then they may be able to show a constitutionally protected property interest, regardless of *Totten*." Further, the court found that the Does had sufficiently stated due process claims on two separate theories—that the CIA had placed the Does in danger and that the CIA had created a special relationship with the Does.[2]

The United States later renewed its motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) and moved for summary judgment under Rule 56(c). The district court denied these motions and we granted an interlocutory appeal. See 28 U.S.C. § 1292(b). On appeal, the United States maintains that

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[2] The district court granted the CIA's motion to dismiss in part, holding that the Does had failed to allege facts demonstrating that the Agency had subjected them to unequal treatment in violation of the Fifth Amendment.

there is no jurisdiction over the case because any suit must be in the Court of Federal Claims, and because the rule in *Totten*, 92 U.S. at 107, requires dismissal of the Does' case. We disagree.

II

At the outset, we must address whether the Tucker Act, 28 U.S.C. § 1491(a)(1), precludes the district court from exercising jurisdiction in this case. That Act, in relevant part, grants the Court of Federal Claims exclusive jurisdiction over any claim against the United States in excess of $10,000 that is "founded . . . upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1).[3]

The Does do not frame their complaint expressly to assert a contract claim. Indeed, they reserve the right to bring a contract action in the Court of Federal Claims at a later date. The label that is attached to a claim is not conclusive, however. Whether an action is founded upon a contract for purposes of the Tucker Act "depends both on the source of the rights upon which the plaintiff bases its claims, and upon the type of relief sought (or appropriate)." *Megapulse* v. *Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982); see also *North Star Alaska* v. *United States*, 14 F.3d 36, 37 (9th Cir. 1994) (adopting the *Megapulse* test).

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[3] The Tucker Act does not specify that the jurisdiction of the Court of Federal Claims over contract claims in excess of $10,000 is exclusive, but courts have referred to the Tucker Act's grant of exclusive jurisdiction as a shorthand way of recognizing that Congress has waived sovereign immunity for such claims only for actions brought in the Court of Federal Claims. See, e.g., *Transohio Sav. Bank* v. *Director, Office of Thrift Supervision*, 967 F.2d 598, 608-09 (D.C. Cir. 1992).

The Does' complaint may be read as seeking an injunction directing payment of $27,000 per year because that figure was agreed upon by the Does and the CIA. Such an award derived from the agreement of the parties, although phrased in terms of constitutional due process, would amount to specific performance of the contract that the Does allege that they had with the government—an agreement to "ensure financial and personal security for life." That type of claim falls within the exclusive jurisdiction of the Court of Federal Claims. See *North Star*, 14 F.3d at 37-38 (right to reformation of contract, even if phrased as statutory or constitutional right, is based on terms of contract and is therefore subject to the Tucker Act). The fact that the Court of Federal Claims has no power to grant specific enforcement of a contract does not mean that a suit for specific enforcement can be brought in district court. The Tucker Act is a limited waiver of sovereign immunity for contract actions; equitable contract remedies denied by the Court of Federal Claims are not within the waiver and may not be enforced against the United States at all. See *id.* at 38.

The primary claim of the Does, however, is for an injunction requiring the CIA to conduct internal hearings on their claims that comport with due process. The effect of the Tucker Act on this claim for relief depends upon the interest—life, liberty or property—that is asserted to trigger the requirement of procedural due process. One type of property interest might be argued to arise from the alleged contract between the CIA and the Does, which the Does allege guaranteed lifetime payments and protection. The District of Columbia Circuit has held that a due process claim that is triggered by a contractually-based property interest may be

brought in district court, on the theory that the right sought to be enforced arises from the due process clause and is not a suit on the contract itself. See *Transohio Sav. Bank* v. *Director, Office of Thrift Supervision*, 967 F.2d 598, 610-11 (D.C. Cir. 1992); *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523-24 (D.C. Cir. 1986). Our circuit has taken a stricter view, however, and has held that constitutional claims based on a contractual property interest fall within the Tucker Act and may not be brought in district court. See *Tucson Airport Auth.* v. *General Dynamics Corp.*, 136 F.3d 641, 647-48 (9th Cir. 1998) (rejecting *Transohio* rule); cf. *North Star*, 14 F.3d at 37-38. In this view, we are joined by the Second Circuit. See *Up State Fed. Credit Union* v. *Walker*, 198 F.3d 372, 377 (2d Cir. 1999) (holding that district court did not have jurisdiction over any claims that could not exist independently of a contract).[4]

[4] Our decisions in *Tucson Airport* and *North Star*, and the Second Circuit's decision in *Up State*, involved plaintiffs who sought by invoking a constitutional claim to secure rights guaranteed by the contract. Such actions are more directly contractual than those brought by the Does, who do not seek to enforce the contract in district court but merely to force the CIA to hold a hearing that meets the requirements of procedural due process. Our ruling in *Tucson Airport*, however, is broad enough to cover the present case:

> [B]ecause General Dynamic's constitutional claims are contractually-based, the district court lacks jurisdiction under the Tucker Act. All three constitutional claims are premised on the notion that the United States has some contractual obligation to General Dynamics under the Modification Center Contract that it has failed to satisfy. If the Modification Center Contract imposes no such obligation, the United States owes no duty to General Dynamics giving rise to an alleged constitutional violation. Because the United States's obligation is in the first instance dependent on the contract, these claims are contractually-based. *Tucson Airport*, 136 F.3d at 647. This rationale, by which we are bound, applies to any due process claim of the Does that is based on their contract with the CIA.

Indeed, one district court in New York has held that a constitutional claim seeking enforcement of a CIA contract similar to that alleged by the Does, and also seeking a declaration requiring a due process hearing, was subject to the Tucker Act and could not be brought in district court. See *Kielczynski* v. *United States CIA*, 128 F. Supp. 2d 151, 160 (E.D.N.Y. 2001), aff'd sub nom. *Kielczynski* v. *Does 1-2*, 56 Fed. Appx. 540, 2003 WL 187164 (2d Cir. 2003) (unpublished).

Perhaps because of this line of authority, the Does contend that their claim to a due process hearing is *not* based on their contract with the CIA. Several of the stated due process claims, however, are based in considerable part on the CIA contract, and the district court seems so to have interpreted it. These claims, for reasons we have just stated, may not be entertained by the district court. The Does, however, assert additional bases for their due process claims that do not suffer from the same jurisdictional defect.

The primary additional claim is based on an interest in liberty. The Does' claim that, regardless of the terms of their contract or whether a contract even existed, the CIA brought them into this country under conditions requiring a false identity and false history for their continuing safety. The Does allege and declare that, because of the false history and false references supplied by the CIA and the CIA's refusal to assist them further, no employment is available to them in the United States now that Mr. Doe's employment here was terminated. The failure of the CIA to provide the

means for their subsistence, according to the Does, leaves them no alternative but to return to eastern Europe, where they are in danger. The district court held that the Does had raised a triable issue of fact with regard to this claim based on a liberty interest. The district court also held that these same allegations and declarations presented a triable issue of a due process violation based on the duty of the government not to act affirmatively to place a person in a dangerous situation. See *Huffman* v. *County of Los Angeles*, 147 F.3d 1054, 1059 (9th Cir. 1998). Without indicating any view as to the ultimate merits of these claims, we find no error in the district court's ruling denying summary judgment and permitting these claims to go forward.[5] We also conclude that the district court is not precluded by the Tucker Act from entertaining these claims, because they are not founded upon, and do not depend on, any alleged contract between the CIA and the Does.

The Does also contend that their right to procedural due process arises from their status as persons in the PL-110 program. The government contends that the only relevant provision of that Act is 50 U.S.C. § 403h, which authorizes the Attorney General in the interest of national security to cause the admission of particular aliens as permanent residents regardless of their inadmissibility under other laws. See 50 U.S.C. § 403h. The government argues that this statute clearly creates no entitlement of the sort claimed by the Does. The

[5] We emphasize that this litigation is in a very early stage and full-fledged discovery has not yet begun. If, in further proceedings, the state of the evidence on this claim or any other claim that we permit to go forward becomes such that no rational trier of fact could find for the Does, nothing we say here prevents a renewed motion for summary judgment on the part of the CIA.

Does contend, however, that other regulations and practices of the CIA establish an entitlement to continued support for persons brought into the United States pursuant to the program.

It is difficult to evaluate this claim for purposes of the Tucker Act (or for summary judgment) because the internal regulations of the CIA that have been presented are redacted, and it is not clear that all regulations that might bear on the subject have been produced. The unredacted portions of the regulations in the record do not present sufficient foundation for the Does' claim to permit them to survive summary judgment, but we do not know what is in the unredacted portions or whether other undisclosed regulations might bear on the subject.[6] Because the government relied on its right to dismissal under *Totten* and the Tucker Act, the record is not fully developed. Discovery has been stayed by the district court pending this appeal. Although the Does have not yet made their case on their claim of PL-110 status, a grant of sum-

[6] The record contains a declaration from a CIA official that "I can inform the court unequivocally that there are *no* Agency or other federal regulations that require the CIA to provide lifetime subsistence assistance to individuals brought into the United States under the authority of PL-110. Neither PL-110, nor any other law, statute, regulation, internal policy, unstated principle or anything else has ever before, or does now, obligate the Agency to provide any form of lifetime financial assistance to individuals brought into the United States by CIA under the authority of PL-110."

The district court interpreted the first sentence above as a declaration that the official's search revealed no Agency or other federal regulations that require the CIA to provide lifetime subsistence. The court disregarded the legal conclusions set forth in the second sentence.

mary judgment against them would be premature at this point. We therefore affirm the district court's denial of summary judgment on the due process claim based on PL-110 status. Whether that claim may be successfully maintained in further proceedings in district court will depend in part on whether the government asserts a state secrets privilege, see Part III, *infra*, and what disposition follows from that assertion.

We emphasize, however, that a due process claim based on PL-110 status must not depend on the alleged contract, or any other contract, between the CIA and the Does. Such a contract-based due process claim is within the exclusive jurisdiction of the Court of Federal Claims under our decision in *Tucson Airport*. In denying the government's motion for summary judgment on the claim based on PL-110 status, the district court stated that the claim was based "not only on the regulations, but also on promises made to them and on the surrounding circumstances. A plaintiff's property right may exist if words, conduct, or circumstances indicate a mutually explicit understanding between the parties." The Tucker Act, however, grants exclusive jurisdiction to the Court of Federal Claims over actions "founded . . . upon any express or implied contract with the United States." 28 U.S.C. § 1491(a). This grant encompasses claims based on "a mutually explicit understanding between the parties." If the Does are to pursue their due process claim based on PL-110 status in district court, they will have to establish a property right arising from such status that is not based on an express or implied contract.[7]

[7] The Does ultimately have the burden of showing entitlement. If a state secret privilege is asserted and the district court concludes that the evidence required to support the Does' claim is denied them because of the privilege, then the Does' claim will fail, as we explain below in discussing the *Totten* issue.

The Does also contend that CIA procedural regulations grant them a right to a fair hearing regarding their entitlement to benefits under the PL-110 program. Here again, the record may be incomplete because not all of the regulations are presented in full form. An agency is generally required to follow its own regulations. *Vitarelli* v. *Seaton*, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959). The government contends that the regulations impose no requirements on the CIA, and the unredacted portions of the regulations now in the record support the CIA's position. Here, too, it is too early in the litigation to enter a summary judgment against the Does because further proceedings, including discovery, may provide further support for their claim. If the Does' entitlement to a hearing under the regulations is based on their alleged contract with the CIA rather than a status conferred by regulation or other conditions independent of the contract, then under the principle of *Tucson Airport* the Tucker Act will preclude further proceedings on that claim in the district court as well.

The final claim presented by the Does is one of estoppel. The district court concluded that the Does had adequately pleaded the elements of estoppel: that the government actors knew the facts, that they intended that their conduct would be acted upon or acted in such a way that the Does had a right to believe they so intended, that the Does were ignorant of the true facts, and that they detrimentally relied on the conduct of the government actors. See *Lehman* v. *United States*, 154

F.3d 1010, 1016 (9th Cir. 1998). In addition, estoppel against the government requires a showing that the government actors "engaged in affirmative conduct going beyond mere negligence and that the public's interest will not suffer undue damage as a result" of the estoppel. *Id.* at 1016-17 (internal quotation marks and citation omitted). The district court held that the Does had raised a triable issue of fact concerning these last two requirements. On the basis of John Doe's declaration, the district court did not err in so ruling.

Under *Office of Personnel Management* v. *Richmond*, 496 U.S. 414, 426, 110 S. Ct. 2465, 110 L. Ed. 2d 387 (1990), a litigant can use estoppel defensively but not offensively against the government. See *United States* v. *Hatcher*, 922 F.2d 1402, 1409 (9th Cir. 1991). *Richmond's* prohibition is against using estoppel offensively to obtain an award that would be contrary to a statute and would thus violate the Appropriations Clause of the Constitution. See *Richmond*, 496 U.S. at 424, 110 S. Ct. 2465. The Does, however, claim that payment of their subsistence is clearly authorized by statute and regulation and thus would violate no principle of *Richmond* or the Appropriations Clause. They also contend that their use of estoppel is similar to that authorized by this court in *Watkins* v. *United States Army*, 875 F.2d 699 (9th Cir. 1989) (en banc), where we held the government estopped from preventing the plaintiff's reenlistment in the Army. *Id.* at 711. We conclude that the Does have made a sufficient showing to forestall summary judgment. The district court accordingly did not err in denying summary judgment on the estoppel claim.

We also conclude that the estoppel claim does not fall within the confines of the Tucker Act, because it is not founded on an express or implied contract. See *Jablon* v. *United States*, 657 F.2d 1064, 1069-70 (9th Cir. 1981). Although *Jablon* also held that the United States had not waived its immunity from a promissory estoppel claim, *id.* at 1070 & n.9, our subsequent en banc decision in *Watkins* supports the use of estoppel to prevent the government from denying the benefit of PL-110 status if all of the elements can be proved. The district court did not err in concluding that it had jurisdiction to entertain the estoppel claim.

We therefore conclude that the Does are not barred by the Tucker Act from proceeding on their constitutional, statutory or regulatory claims or their estoppel claim in the district court, so long as those claims are not based on the alleged contract, or any contract, between the CIA and the Does. Those claims that we have identified as being based on contract are not within the jurisdiction of the district court and must be dismissed. The district court may proceed with the remaining claims. See *North Side Lumber Co.* v. *Block*, 753 F.2d 1482, 1486 (9th Cir. 1985) (holding that contractual claim must be dismissed under the Tucker Act, but other claims could go forward on remand).

III

Resolution of this case also requires us to decide whether *Totten* bars judicial review of this action.

One hundred twenty-five years ago, the Supreme Court dismissed a civil war spy's case for damages for breach of a contract with the government. See *Totten*, 92 U.S. 105, 23 L. Ed. 605. The Agency maintains that

as this case is also one by spies seeking recompense, *Totten* squarely governs this case. We do not agree.

Totten was indeed a landmark case, and one that retains its core vitality. But, as discussed at length below, *Totten* does not require immediate dismissal as to the Does' case because their claims—those that survive our Tucker Act analysis—do not arise out of an implied or express contract. Instead, the instant case is governed by the state secrets privilege, a separate aspect of the decision in *Totten* that has evolved into a well-articulated body of law addressing situations in which security interests preclude the revelation of factual matter in court.

Both the Supreme Court and our own court have specified the mode in which the government must invoke the state secrets privilege and the manner in which courts must apply it. And since *Totten*, the constitutional protection of the right to due process of law has developed into an assurance in most instances of *some* fair procedure, secret or open, judicial or administrative, before governmental deprivation of liberty or property becomes final. These two developments, taken together, preclude the summary dismissal of this case for which the Agency argues.

We acknowledge at the outset that it could very well turn out, after further district court proceedings, that the Does will still be left without redress even if everything they allege is true. When the government asserts that the interests of individuals otherwise subject to legal redress must give way to national security interests for the larger public good, the result can end in a balance tipped toward the greater good, with resulting unfairness to the individual litigants as the

acknowledged corollary. See *Bareford* v. *Gen. Dynamics Corp.*, 973 F.2d 1138, 1144 (5th Cir. 1992); *Fitzgerald* v. *Penthouse Int'l Ltd.*, 776 F.2d 1236, 1238 n.3 (4th Cir. 1985); *cf. Nixon* v. *Sirica*, 487 F.2d 700, 713 (D.C. Cir. 1973).

But precisely because the net result of refusing to adjudicate the Does' claims is to sacrifice their asserted constitutional interests to the security of the nation as a whole, both the government and the courts need to consider discretely, rather than by formula, whether this is a case in which there is simply no acceptable alternative to that sacrifice. The law regarding protection of national security interests in judicial proceedings provides guidance toward that end. State secrets privilege law prescribes that courts must be sure that claims of paramount national security interest are presented in the manner that has been devised best to assure their validity and must consider whether there are alternatives to outright dismissal that could provide whatever assurances of secrecy are necessary. That counterweight role has been reserved for the judiciary. We must fulfill it with precision and care, lest we encourage both executive overreaching and a corrosive appearance of inequitable treatment of those who have undertaken great risks to help our nation, an appearance that could itself have long-run national security implications.

A.

In *Totten*, the estate of William A. Lloyd, a spy hired by President Abraham Lincoln to gain information on Confederate troop positions during the Civil War, brought suit in the Court of Claims to recover compensation Lloyd had allegedly been promised under his

secret agreement with the President. The Supreme Court explained that the case was not justiciable because:

> The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained . . . whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service, with liability to publicity in this way, would be impossible; and, as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award.

Id. at 106-07. In applying this reasoning to the claim of the Totten estate, the Court concluded that "[t]he publicity produced by an action would itself be a *breach of a contract* . . . and thus defeat a recovery." *Id.* at 107 (emphasis added).

The Agency and the dissent treat *Totten* as a jurisdictional bar to any case arising out of a relationship involving spy services. On this view, a court faced with any cause of action that traces back to allegations of an espionage relationship with the government must simply dismiss the complaint. We do not read *Totten* so broadly.

Read with care, *Totten* embodies two rulings. The first, often mistaken for a blanket prohibition on suits arising out of acts of espionage, is instead simply a holding concerning contract law: In *Totten*, the plaintiff, Lloyd, breached his contract with the President by revealing the contract's contents in his lawsuit. The Supreme Court held that because an implicit aspect of the contract was that the parties agreed to keep the very existence of the contract secret, "[t]he publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery." See *id.*; see also *Halpern* v. *United States*, 258 F.2d 36, 44 (2d Cir. 1958) (explaining that *Totten* "primarily turned on the breach of contract which the Court found occurred by the very bringing of the action"); Edward J. Imwinkelried, The New Wigmore: A Treatise on Evidence § 8.2 at 1146 (2002) ("[A] close reading of [*Totten*] indicates that the basis for the decision was the law of contracts rather than any privilege doctrine.") (citing Charles A. Wright & Kenneth W. Graham, Jr.,

Federal Practice and Procedure: Evidence § 5663, at 506 & n. 39 (1992)).

For two reasons, the contractual holding of *Totten* is not applicable here. First, as discussed in Part II, unlike Totten, the Does do not seek only enforcement of a contract. Rather their principal concern at this point, as they explain in their brief to this court, is "to compel fair process and application of substantive law to their claims within the Central Intelligence Agency's . . . internal administrative process." As the Agency is accustomed to conducting its affairs in secret, a fair internal process could presumably proceed in accordance with the secrecy implicit in an agreement to engage in espionage.

Second, *Totten* assumed "publicity" inconsistent with the implicit promise of secrecy as inherent in any judicial proceeding and did not consider whether there are means to conduct judicial proceedings without unacceptable attendant "publicity." Since *Totten*, courts, including the Supreme Court, have developed means of accommodating asserted national security interests in judicial proceedings while remaining mindful that there are circumstances in which no special procedures will be adequate to protect those interests. To the extent that the court can proceed without generating public exposure, it may be possible to fulfill any secrecy promise implicit in the agreement.

Here, the Does have so far proceeded in a manner that has not breached the agreement. They have done everything in their power not to reveal secret information: They filed suit under fictitious names and revealed only minimal, nonidentifying details in their complaint. Their attorneys for security reasons cleared

their complaint with CIA officials before filing it, and received security clearances from the CIA.

With court and government cooperation, it may be possible to continue the suit in a manner that avoids public exposure of any secret information.[8] Possible measures include using *in camera* proceedings, sealing records, and requiring security clearances for court personnel and attorneys with access to the court records. See, e.g., *Halpern*, 258 F.2d at 43 (describing the availability of an *in camera* trial as an option when the government invoked the state secrets privilege); *In re*

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[8] *In camera* court review is routinely considered consistent with assertions of the need for secrecy. *Cf. Loral Corp.* v. *McDonnell Douglas Corp.*, 558 F.2d 1130, 1132 (2d Cir. 1977) (invocation of state secrets privilege does not preclude court review of documents *in camera*). Review by the court *in camera* of a contract or other materials claimed to be secret is no different from *in camera* review of allegedly secret materials in a trade secrets case, or of evidence asserted to be subject to the attorney-client privilege. In such situations, a court's *in camera* inspection to determine whether a privilege applies is not itself a breach of the privilege. See, e.g., *United States* v. *Zolin*, 491 U.S. 554, 568-69, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989) (privileges survive *in camera* review); *In re Perrigo Co.*, 128 F.3d 430, 441 (6th Cir. 1997) (no waiver of attorney-client privilege by submitting documents to the court for *in camera* review); *Burlington N.R. Co.* v. *Omaha Pub. Power Dist.*, 888 F.2d 1228, 1232 (8th Cir. 1989) (contract alleged to be trade secret could be reviewed *in camera* without revealing trade secret); see also *Anderson* v. *Dep't of Health and Human Serv.*, 907 F.2d 936, 942 (10th Cir. 1990) (*in camera* review by court of documents to determine if material could be released to public under the Freedom of Information Act ("FOIA") does not equate with release to the public). Just as privileges are not waived and secrets not considered revealed in other contexts by *in camera* review, a court's review of documents *in camera* here would not breach any obligation the Does may have to keep the agreement secret.

United States, 872 F.2d 472, 478 (D.C. Cir. 1989) (describing options of *in camera* review, redaction, limited disclosure of documents, and a bench trial); *Fitzgerald* v. *Penthouse Int'l Ltd.*, 776 F.2d 1236, 1243 (4th Cir. 1985) ("Once the state secrets privilege has been properly invoked, the district court must consider whether and how the case may proceed in light of the privilege. The court may fashion appropriate procedures to protect against disclosure."); *United States* v. *Musa*, 833 F. Supp. 752, 758-61 (E.D. Mo. 1993) (putting a protective order in place to control viewing of classified documents and requiring counsel to sign confidentiality agreement); see generally, Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 Yale L.J. 570, 586-88, n. 90 (1982); Veronica M. Fallon, Note, Keeping Secrets from the Jury: New Options for Safeguarding State Secrets, 47 Fordham L.Rev. 94, 109-13 (1978); *cf. Guerra* v. *Board of Trs.*, 567 F.2d 352, 355 (9th Cir. 1977) (describing methods court could use to protect confidentiality including *in camera* review, sealing of records, and deletion of names); Classified Information Procedures Act (CIPA), Pub. L. 96-456, 94 Stat. 2025 (Oct. 15, 1980), 18 U.S.C. app. III § 1 *et seq.* (providing procedures for use of privileged information as evidence in criminal trials); Neil A. Lewis, After Sept. 11, a Little Known Court has a Greater Role, N.Y. Times, May 3, 2002, at A20 (describing the Foreign Intelligence Surveillance Court and its procedures for approving wiretaps without jeopardizing national security or releasing state secrets).

Thus, *Totten's* holding with regard to enforcement of the secrecy aspect of contracts for spy services should not entirely preclude further proceedings in this suit.

And with some creativity in devising flexible procedures such as those suggested by courts that have grappled with these issues in the century and a quarter since *Totten*, it may prove possible to resolve the essential issues through court processes. That is not to say that such *in camera* review would always be justified or permissible, but only that it would not be precluded on a breach of contract theory.

B.

The other element of *Totten* is an early expression of the evidentiary state secrets privilege: "*[P]ublic policy* forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." *Totten*, 92 U.S. at 107 (emphasis added). This public policy principle has flowered into the state secrets doctrine of today. It is principally in this context that the Supreme Court has reaffirmed *Totten's* currency. See *United States* v. *Reynolds*, 345 U.S. 1, 7 n. 11, 73 S. Ct. 528, 97 L. Ed. 727 (1953) (citing *Totten* for support of the "well established" military secrets privilege); *Jencks* v. *United States*, 353 U.S. 657, 670 n. 16, 77 S. Ct. 1007, 1 L. Ed. 2d 1103 (1957) (citing *Reynolds* and *Totten* for general principle that government documents may be privileged on basis of national interest); *Rubin* v. *United States*, 525 U.S. 990, 992, 119 S. Ct. 461, 142 L. Ed. 2d 413 (1998) (Breyer, J., dissenting from denial of *cert.*) (citing *Totten* for state secrets privilege).

This court has so recognized. Our leading recent case construing *Totten* treats *Totten* as a state secrets case,

albeit one of a special variety. See *Kasza* v. *Browner*, 133 F.3d 1159, 1166-67 (9th Cir. 1998).

In *Kasza*, we noted that "[t]he state secrets privilege is a common law evidentiary privilege that allows the government to deny discovery of military secrets," *id.* at 1165, and further noted that invoking the privilege requires certain formalities (discussed below in part III.C). We then stated that "*[o]nce the privilege is properly invoked and the court is satisfied as to the danger of divulging state secrets* . . . [t]he application of the state secrets privilege can . . . have three effects," one of which is "dismiss[ing] the plaintiff's action based solely on the invocation of the state secrets privilege." *Id.* at 1166 (emphasis added). For the latter point, *Kasza* cited, *inter alia*, *Totten*. *Kasza*, 133 F.3d at 1166.

Kasza then went on to apply its analysis to the facts of the case before it, investigating whether the privilege was "properly asserted and, even if properly asserted, [whether] the . . . invocation of the privilege was overbroad." *Id.* at 1168. Concluding that the government defendant had "satisfied the formal requirements necessary to invoke the privilege," *id.* at 1169, we determined that "*in camera* review of . . . classified declarations was an appropriate means to resolve the . . . scope of the state secrets privilege." *Id.* After conducting that *in camera* review, we decided, quoting *Totten*, that *Kasza*, like *Totten*, was a case in which " 'the trial . . . would inevitably lead to the disclosure of matters which the law itself regards as confidential,' "because "the very subject matter of Frost's action is a state secret." *Kasza*, 133 F.3d at 1170.

It is therefore the law of this circuit that *Totten* permits dismissal of cases in which it is asserted that the very subject matter is a state secret only *after* complying with the formalities and court investigation requirements that have developed since *Totten* within the framework of the state secrets doctrine.[9] This understanding of the role of *Totten* in the contemporary legal world comports with both *Totten* and later Supreme Court authority. *Totten* relied on other well-established privileges, such as the spousal privilege, attorney-client privilege, doctor-patient privilege, and clergy-penitent privilege, as a basis for its holding with regard to national secrets. See *Totten*, 92 U.S. at 107. Moreover, it is primarily in the context of the state

[9] Other circuits have similarly treated *Totten* as the progenitor of the state secrets doctrine, now subject to later-enunciated standards governing recognition of the privilege. *See Clift* v. *United States*, 597 F.2d 826, 828-30 (2d Cir. 1979) (holding that a case analogous to *Totten* should be analyzed under the state secrets privilege, and that the case could go forward even though revealing the underlying subject of the lawsuit, a secret patent, was barred by the privilege); *United States* v. *Ehrlichman*, 376 F. Supp. 29, 32 n.1 (D.D.C. 1974) (citing *Nixon* v. *Sirica*, 487 F.2d 700, 713 (D.C. Cir. 1973)) (describing the modification of Totten "by a century of legal experience, which teaches that the courts have broad authority to inquire into national security matters so long as proper safeguards are applied to avoid unwarranted disclosures"). The Federal Circuit appears to have conflicting authority on the application of *Totten*. Compare *McDonnell Douglas Corp.* v. *United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003) (citing to *Totten*, 92 U.S. at 107, for proposition that "when the 'very subject matter of the action' is a state or military secret, the action must give way to the proper invocation of the state secrets privilege." (emphasis added)) with *Guong* v. *United States*, 860 F.2d 1063, 1066 (Fed. Cir. 1988) ("A close reading of *Reynolds* reveals that it does not limit or modify the authority of *Totten*.").

secrets privilege that the Supreme Court in recent years has affirmatively cited to *Totten*.

The Agency relies on *Weinberger* v. *Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 102 S. Ct. 197, 70 L. Ed. 2d 298 (1981) for its contrary view of *Totten* as a free-floating, expansive doctrine of its own, divorced from the later development of the state secrets privilege. *Kasza*, however, was decided well after *Weinberger*, so *Kasza* is binding on us regarding the modern role of the *Totten* doctrine.

Further, *Weinberger* concerned in the main an explicit statutory exemption to the Freedom of Information Act ("FOIA"). *See Weinberger*, 454 U.S. at 144, 102 S. Ct. 197. FOIA analysis is governed strictly by statute, while the state secrets privilege is governed solely by judge-made law. Also, FOIA cases involve a determination of what information can be released *to the public* without any restriction on the information's dissemination. In contrast, the state secrets privilege governs what material can be used by individual litigants who need such information to make their cases, under such restrictions of access as may be necessary, including *in camera* review, closed proceedings, and sealed records. *Weinberger* therefore dealt principally with the substantive question whether the sensitive material at issue could be made public and only as a subsidiary matter with the handling of that material within the confines of litigation.

Weinberger did refer to *Totten* at the end of the opinion as an explanation, by analogy, concerning why the National Environmental Policy Act ("NEPA") inquiry could not go forward in court. It also referred, however, in the same context, to *Reynolds*, the seminal

state secrets privilege case. *Weinberger*, 454 U.S. at 147, 102 S. Ct. 197. The brief reference to *Totten* in *Weinberger* therefore cannot be read as prescribing the application of *Totten* without regard to the later-developed state secrets privilege doctrine, and *Kasza* evidently did not so read it.

We therefore conclude that *Totten* is applicable to the case before us only as applied through the prism of current state secrets doctrine.

C.

To invoke the state secrets privilege, a formal claim of privilege must be "lodged by the head of the department which has control over the matter, after actual personal consideration [of the evidence] by that officer." *Reynolds*, 345 U.S. at 7-8, 73 S. Ct. 528 (footnotes omitted); see also *Kasza*, 133 F.3d at 1165. After that, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege." *Reynolds*, 345 U.S. at 8, 73 S. Ct. 528; *see also Kasza*, 133 F.3d at 1165. The government has not thus far asserted the state secrets privilege in this case and has therefore not complied with the required procedures.[10]

This initial matter is one of formalities, true. But formalities often matter a great deal, and they certainly matter here. As *Kasza* noted, "dismissal of an action based on the state secrets privilege is harsh," but sometimes "the greater public good—ultimately the less harsh remedy—[is] dismissal." *Id.* at 1167 (internal

[10] On remand, the government should be given the opportunity before the case proceeds further to assert the state secrets privilege should it choose to do so.

citation and quotation marks omitted). Determining when we must ask individuals to bear the brunt of our national interest is a matter of profound moral importance. We therefore require that the government address the question in a manner commensurate with its gravity.

Additionally, there are practical reasons for insisting upon compliance with the formalities established by the state secrets privilege. There is always the possibility that subordinate officials have a motive to seek dismissal of an action based on state secrets considerations because they themselves, or someone under their supervision, would be exposed as having acted unfairly or illegally if the case went forward. Also, invocation of the state secrets privilege can have adverse as well as salutary effects on national security interests. If persons contracting with the government on matters involving the national security—spies, yes, but also suppliers of military and espionage-related goods and services—come to expect that promises cannot be enforced, their willingness to offer their services may in the long run dissipate.

For all these reasons, the state secrets privilege "is not to be lightly invoked." *Reynolds*, 345 U.S. at 7, 73 S. Ct. 528. If we are to inflict upon individuals otherwise protected by our laws, particularly the United States Constitution, the harsh remedy of dismissal to protect the rest of us, we must do so only after the individual responsible for the national security interest at stake personally reviews the matter, and only after he or she concludes and certifies that there is indeed a national security basis for refusing to allow any form of court consideration of the facts necessary to adjudicate

the dispute. It is invocation at that level of the executive hierarchy, and with that degree of personal assurance, that lessens the possibility of reflexive invocation of the doctrine as a routine way to avoid adverse judicial decisions. Invocation at that level of the executive hierarchy therefore underlies the "utmost deference" accorded state secrets claims. See *Kasza*, 133 F.3d at 1166.

The government has not complied here with the formalities essential to invocation of the state secrets privilege. That is reason enough to affirm the district court's refusal to dismiss this case.

D.

Given our holdings that the Tucker Act does not preclude the bringing of some of the Does' claims in the district court, and that *Totten* does not jurisdictionally preclude the lawsuit before us, we provide some guidance concerning the handling of the remaining claims should the state secrets privilege be invoked.

In *Reynolds*, the Court emphasized that judges must carefully review assertions of the state secrets privilege before approving the privilege. *See Reynolds*, 345 U.S. at 9-10, 73 S. Ct. 528; see also *Jencks*, 353 U.S. at 676, 77 S. Ct. 1007 (Burton, J., concurring). "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Reynolds*, 345 U.S. at 9-10, 73 S. Ct. 528; *see also In re United States*, 872 F.2d at 475; *Ellsberg* v. *Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983); 8 Wigmore on Evidence § 2379 at 809-10 (McNaughton Rev. 1961) ("A court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish

bureaucratic officials too ample opportunities for abusing the [state secrets] privilege."); James Zagel, The State Secrets Privilege, 50 Minn L. Rev. 875, 900 (1966); Raoul Berger & Abe Krash, Government Immunity from Discovery, 59 Yale L.J. 1451, 1463 (1950).

More specifically, before approving the application of the privilege, the district court must be convinced by the Agency that there is a "reasonable danger" that military or national secrets will be revealed. *Reynolds*, 345 U.S. at 10-11, 73 S. Ct. 528. The state secrets privilege is an absolute privilege and cannot be overcome by a showing of necessity. Nonetheless, the greater the party's need for the evidence, the more deeply a court must probe to see whether state secrets are in fact at risk. *Reynolds*, 345 U.S. at 11, 73 S. Ct. 528; *Ellsberg*, 709 F.2d at 58-59.

As discussed at length previously, there are numerous safeguards courts can use to protect secret material from public exposure. The standard practice when evaluating claims that the state secrets privilege applies is to conduct *in camera* and *ex parte* review of documents. *See Kerr* v. *United States*, 426 U.S. 394, 405-06, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976) (citing *Nixon*, 418 U.S. at 706, 94 S. Ct. 3090 and *Reynolds*, 345 U.S. at 1, 73 S. Ct. 528); *Kasza*, 133 F.3d at 1166, 1169; *In re United States*, 872 F.2d at 475, 478-79; *Ellsberg*, 709 F.2d at 59.

In addition, unprivileged material can and must be separated from the privileged material. See *Kasza*, 133 F.3d at 1166 ("[W]henever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.") (quoting *Ellsberg*, 709 F.2d at 57); *In re United States*, 872 F.2d

at 475-76 ("The 'broad sweep' of the [state secrets] privilege, likewise requires that the privilege not be used to shield any material not strictly necessary to prevent injury to national security . . . .") (citing *Ellsberg*, 709 F.2d at 57). Finally, sealing of records and secret hearings are possible ways to adjudicate issues without public exposure of state secrets. *See, e.g.*, *Halpern*, 258 F.2d at 43; *In re United States*, 872 F.2d at 478. Where, as here, the government is seeking complete dismissal of the action for national security reasons, a court should consider these possibilities before determining that there is no way both to adjudicate the case and to protect state secrets.

Webster v. *Doe*, 486 U.S. 592, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988), confirms that particularly where constitutional claims are at issue, the *Reynolds* inquiry requires courts to make every effort to ascertain whether the claims in question can be adjudicated while protecting the national security interests asserted. In *Webster*, a discharged CIA covert employee, Doe, was allowed to go forward with his constitutional challenge to the CIA's denial of his security clearance. 486 U.S. at 604-05, 108 S. Ct. 2047. It is no accident that the case was called *Webster* v. *Doe*. In *Webster*, as here, the fact of the relationship with the CIA was secret. As the Court of Appeals in the case that became *Webster* explained, "John Doe [was] proceeding under a pseudonym only because his status as a CIA employee cannot be publicly acknowledged, not because of any embarrassment about his homosexuality." *Doe* v. *Casey*, 796 F.2d 1508, 1512 n.2 (D.C. Cir. 1986). So with regard to the secrecy of the relationship, the circumstances were the same as those present here.

Noting that a "serious constitutional question" would arise if consideration of Doe's constitutional claims were foreclosed, *Webster* permitted the constitutional causes of action to go forward despite the secrecy of the relationship. 486 U.S. at 603-05, 108 S. Ct. 2047 (citing *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 n.12, 106 S. Ct. 2133, 90 L. Ed. 2d 623 (1986)). In so doing, the Court recognized that issues of national security could arise in the course of the litigation, necessitating special litigation procedures. Given the constitutional nature of the cause of action, however, the Court rejected the contention that the case should be dismissed out of hand. Instead, the Court instructed that "the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission [,]" *citing, inter alia, Reynolds*. *Webster*, 486 U.S. at 604, 108 S. Ct. 2047.

Webster indicates that where constitutional issues are raised, the courts must consider the full panoply of alternative litigation methods outlined above—*in camera* review, sealed records, and, if necessary, secret proceedings—before concluding that the only alternative is to dismiss the case and thereby deny the plaintiff's claimed constitutional rights. The only obvious differences between *Webster* and this case for present purposes is that the Doe in the *Webster* case was a domestic employee while the Does in this case are foreigners who were engaged to spy for the United States abroad. Absent some reason nationality and location distinctions should matter, and the government

has suggested none, *Webster* requires that the constitutional nature of the Does' cause of action weigh heavily in applying the *Reynolds* state secrets privilege standard.

Applying that standard with the requisite care, we note first, once again, that the Does have alleged both property and liberty interests, including the endangerment of their lives, the interference with their ability to pursue employment, the failure to fulfill the obligations of the PL-110 program, and an estoppel theory. If true, these interests could constitute legitimate liberty and property rights for purposes of the Fifth Amendment. *See Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 573, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

Further, unlike the plaintiff in *Webster*, the Does primarily seek due process within the agency, not before the courts. The central constitutional issue in this case, the procedural due process cause of action, therefore is one that, unlike some of the constitutional causes of action alluded to in *Webster*, should not require factual development in court of the details underlying the dispute. Rather, to make out their procedural due process claim, the Does will need to demonstrate only that they had a relationship with the CIA that could potentially establish an entitlement to continued assistance or payments.

For several reasons, it is not self-evident that the Does, in order to establish such a relationship, will need to jeopardize state secrets:

First, the relationship may not truly be secret. It is widely known that the CIA contracts for spy services, and in particular that the CIA recruits foreign spies. It

is also public knowledge that many of these foreign recruits are provided permanent residency in the United States along with other compensation for their services. *See, e.g.*, Federal Government's Handling of Soviet and Communist Bloc Defectors: Hearing Before the Permanent Subcomm. on Governmental Affairs, U.S. Senate, 100th Cong., 100-02, 174-75 (1987) (describing support under Pub. L. No. 81-110 (1949) for defectors with information of great import to United States' interests); 50 U.S.C. § 403h (2002) (providing for the admission of aliens to this country when it is "in the interest of national security or essential to the furtherance of the national intelligence mission"). Furthermore, the complaint alleges that the CIA sent a letter to the Does admitting a relationship and stating that the Agency was unable to continue supporting the Does because of "budget constraints." *See* Letter from Nancy Clayborne (June 5, 1997). The existence of such a letter could be evidence that the Does' past relationship with the CIA is not now clandestine.

Second, it is possible that, if a claim of privilege is made, the district court might conclude that the Agency has not provided *any* basis for concluding that national security would be jeopardized by the revelation of the existence of a relationship with the Does. A substantial time has passed since the agreement with the Does was formed, and we are no longer "at war," "cold" or otherwise, with the Does' country of origin. When evaluating the invocation of the state secrets privilege, the district court must give the "utmost deference" to the government's evaluation of what constitutes a state secret that will jeopardize national security. *Kasza*, 133 F.3d at 1166. Such deference, however, does not entirely obviate the CIA's need to make a minimally

coherent explanation to the court concerning why simply admitting to a relationship with the Does could conceivably jeopardize national security.

Finally, because of the limited nature of a procedural due process inquiry, the specifics of the Does' relationship with the CIA—such as the place and manner in which they were recruited, their contacts, and the nature of the espionage—should not need to be revealed. Rather the evidentiary inquiry can be tailored to determine whether the alleged relationship with the CIA in fact existed and, if so, whether the resulting relationship gave rise to a legally cognizable property or liberty interest.

As to whether the CIA's procedures adequately protect any such interest, it is not clear that the agency will claim a secrecy interest in those internal procedures. If it does, the court may well be able to review the available procedure for consistency with constitutional standards in proceedings not open to the public.

It is worth emphasizing that the procedural due process cause of action seeks an alternative, *secret* way of adjudicating the merits of the Does' claims. Assuming the plaintiffs' allegations are true, as we must when evaluating a motion to dismiss, the outright dismissal of the Does' complaint would assuredly deny them their constitutional right to procedural due process, by foreclosing any review of the merits of their claim. Before depriving the Does of all due process, the possible availability of a truncated judicial inquiry, with the primary merits adjudication relegated to the agency, is an approach that merits careful scrutiny.

It is therefore possible that, after the most careful, respectful, and deferential inquiry, the district court could conclude that the Does' case may go forward in some manner, whether in open court or closed, without jeopardizing any state secrets. Accordingly, this case should be remanded to the district court for further proceedings consistent with the current law on the state secrets privilege, and with this opinion.[11]

The national interest normally requires both protection of state secrets and the protection of fundamental constitutional rights. Here, the CIA has not invoked

[11] Both the government and the dissent suggest that judges are not well suited to make evaluations of national security even of the most deferential sort. Once the government asserts the state secrets privilege, the dissent contends, a district court should go no further. That short-circuited approach is not the law, as *Kasza* makes clear. See *Kasza*, 133 F.3d at 1169-70; see also *McDonnell Douglas Corp.*, 323 F.3d at 1023 (affirming the trial court's dismissal of a claim under the state secrets privilege only *after* the trial court had reviewed the material supporting the invocation of the privilege). Although a district court must almost always defer to the government's evaluation of what constitutes a state secret and why, a district court cannot simply rubber stamp the government's conclusions.

The dissent mistakenly relies on *CIA* v. *Sims*, 471 U.S. 159, 105 S. Ct. 1881, 85 L. Ed. 2d 173 (1985) for its contrary proposition. *Sims* was a suit under FOIA in which a statutory exemption applied and allowed the government to withhold requested information. *Id.* at 168, 105 S. Ct. 1881. As discussed with regard to *Weinberger*, FOIA cases require a different calculus than cases involving invocation of the state secrets privilege, as the remedy sought is public disclosure. Furthermore, the *Sims* court did in fact conduct some, albeit minimal, review of the documents at issue. See *id.* at 165, 173, 105 S. Ct. 1881 (discussing with approval the district court's consideration of agency affidavits and evidence used to support the decision to withhold documents under FOIA).

the state secrets privilege nor has the district court had the opportunity independently to review the invocation of such a privilege. We should not precipitously close the courthouse doors to colorable claims of the denial of constitutional rights. The Does' case must therefore be remanded to the district court to provide the Agency the opportunity to formally invoke the state secrets privilege. If the Agency chooses to do so, the district court must then, after careful inquiry and consideration of alternative modes of adjudication, and with the utmost deference to the government's determination of national security interests, evaluate whether any aspect of the Does' case can go forward.

Costs on appeal are awarded to the appellees.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

TALLMAN, Circuit Judge, dissenting:

It is the prerogative of the Supreme Court, not ours, to decide whether *Totten* v. *United States*, 92 U.S. 105, 23 L. Ed. 605 (1875), continues to bar judicial review of actions arising from espionage services performed for the United States by secret agents, or whether the *Totten* doctrine has somehow been supplanted by the modern state secrets evidentiary privilege articulated in *United States* v. *Reynolds*, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953). My colleagues proclaim that *Totten* is "applicable to the case before us only as applied through the prism of current state secrets doctrine." Maj. Op. at 1151. But *Totten* holds that claims brought by secret agents against the government are non-justiciable. *Reynolds*, on the other hand, protects

against the unveiling of state secrets during the prosecution of an otherwise recognized cause of action. Far from modifying *Totten*, the Court's opinion in *Reynolds* reaffirms *Totten's* jurisdictional bar.

Furthermore, the majority fails to recognize the jurisdictional limitation imposed on the Does' lawsuit by the Tucker Act, which requires that this suit be brought in the Court of Federal Claims. Because the court's opinion is contrary to the clear rule announced in *Totten*, and ignores the limitations on our jurisdiction imposed by the Tucker Act, I respectfully dissent.

I

In *Totten*, the estate of William A. Lloyd, a spy hired by President Abraham Lincoln to gain information on Confederate troop positions during the Civil War, sought to recover in the Court of Claims compensation Lloyd had allegedly been promised under his secret agreement with the President. 92 U.S. at 105-06. The Supreme Court upheld the lower court's dismissal of the suit, concluding that the very nature of the contract foreclosed a suit for its enforcement. *Id.* at 107. In language directly applicable to the Does, the Court explained why such cases are not justiciable:

> The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement

> was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained . . . whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public.

Id. at 106-07.

The rule in *Totten* is not limited to breach of contract claims brought by those providing secret services to the government. Expanding its holding beyond the contract analysis, the *Totten* Court reasoned that "general principle[s] [of] public policy forbid[ ] the maintenance of *any* suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." *Id.* at 107 (emphasis added). Implicit in the Court's public policy holding is an understanding that fundamental principles of separation of powers prohibit judicial review of secret contracts entered into by the Executive Branch in its role as guardian of national security. See *id.* at 106 (discussing the President's powers as Commander in Chief); *see also Dept. of the Navy* v. *Egan*, 484 U.S. 518, 527, 108 S. Ct. 818, 98 L. Ed. 2d 918

(1988) (stating that the authority to protect national security information falls to the President as Commander-in-Chief of the armed services and head of the Executive Branch of government.).

There is a key distinction between spy cases like *Totten* and other classes of cases where Congress has provided an express remedy for relief. In the latter, the evidentiary privilege known as "state secrets" may properly be invoked to block otherwise relevant discovery in a recognized cause of action. An example is *United States* v. *Reynolds*. In *Reynolds*, the Supreme Court considered—in the context of a tort claim discovery dispute—the protection afforded to discovery of evidence that would reveal state secrets. *Id.* at 3, 73 S. Ct. 528 (noting that "an important question of the Government's privilege to resist discovery [was] involved").

Reynolds arose from the unfortunate crash of a military plane while it was testing secret electronic equipment. *Id.* at 2-3, 73 S. Ct. 528. The plaintiffs were three widows of civilian observers aboard the plane who died in the crash. *Id.* at 3, 73 S. Ct. 528. In an attempt to obtain discovery in support of their claim against the government under the Federal Tort Claims Act ("FTCA"),[1] the plaintiffs moved pursuant to Rule 34 of the Federal Rules of Civil Procedure for production of the Air Force accident investigation report and the statements of the three surviving crew members taken in connection with that investigation. *Id.* The government moved to quash, claiming that Air Force

[1] 28 U.S.C. § 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . .").

regulations rendered the information privileged against disclosure. *Id.* at 3-4, 73 S. Ct. 528.

The district court rejected the government's claim, finding that the enactment of the FTCA waived the claimed privilege. *Id.* at 4, 73 S. Ct. 528. After the district court had already rendered its decision, it received a letter from the Secretary of the Air Force stating that the release of the information would "not be in the public interest." *Id.* The district court reheard the matter, after which the Secretary of the Air Force filed a formal claim of privilege asserting that the aircraft and its personnel were engaged in a secret mission at the time of the crash. *Id.* Because of the secret nature of the mission, the government refused to produce the requested documents. *Id.* at 5, 73 S. Ct. 528. The court, unable to determine whether the documents contained privileged matter, directed that the issue of negligence be decided in the plaintiffs' favor. *Id.* The government appealed and the court of appeals affirmed. *Id.*

On certiorari, the Supreme Court viewed *Reynolds* as presenting "an important question of the Government's privilege to *resist discovery*." *Id.* at 3, 73 S. Ct. 528 (emphasis added). The Court made clear that the "essential question" in *Reynolds* was whether the Government asserted a valid claim of privilege releasing it of its obligation to produce documents otherwise discoverable under Federal Rule of Civil Procedure 34. *Id.* at 6, 73 S. Ct. 528. The Court held that before the government can withhold relevant evidence under the state secrets privilege, it must first file a "formal claim of privilege, lodged by the head of the department

which has control over the matter"[2] and there must be a judicial determination that "the circumstances are appropriate for the claim." *Id.* at 7-8, 73 S. Ct. 528.

Contrary to the majority's reasoning, *Reynolds* did not alter the long-standing rule announced in *Totten* barring judicial review where the very subject matter of the suit is a state secret. The Supreme Court's opinion in *Reynolds* refers to *Totten* only twice. The most important reference occurs at footnote 26 where the Court expressly distinguished the *Totten*-type of case from the situation presented in *Reynolds*. There, the Court acknowledged that *Totten* is a different kind of case, one "where the very subject matter of the action, a contract to perform espionage, was a matter of state secret." *Reynolds*, 345 U.S. at 11 n.26, 73 S. Ct. 528. For *Totten* cases, the Court observed that "[t]he action [is] dismissed *on the pleadings without ever reaching the question of evidence* . . . ." *Id.* (emphasis added).

The only other reference *Reynolds* makes to *Totten* is found at footnote 11. There, the Court cited *Totten* for the proposition that public policy supports the invocation of evidentiary privileges to exclude evidence in instances where the law regards matters to be confidential. *Id.* at 7 n.11, 73 S. Ct. 528. Footnote 11 does not suggest that the *Totten* doctrine has somehow evolved from a jurisdictional bar into an evidentiary rule of privilege, as the majority reasons. Rather, *Totten* expressly acknowledges that there is a higher

[2] The majority overlooks the fact that in this case, like *Totten*, the very subject matter of the suit is the state secret, and therefore *Reynolds* is not controlling authority and no formal invocation of the evidentiary privilege is necessary.

need to protect the disclosure of a contract for secret services with the government where the very existence of the arrangement is itself the secret not to be disclosed. *Totten*, 92 U.S. at 107.

While *Totten* and *Reynolds* are closely related in that both protect a state secret from disclosure, the rules announced in those cases differ in subtle but important respects. Most importantly, the state secrets privilege in *Reynolds* permits the government to withhold otherwise relevant discovery from a recognized cause of action (e.g., an FTCA case), while the *Totten* doctrine permits the dismissal of a lawsuit because it is non-justiciable before such evidentiary questions are ever reached.

Our holding in *Kasza* v. *Browner*, 133 F.3d 1159 (9th Cir. 1998), supports this conclusion. *Kasza* involved a recognized cause of action under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6972. The appeal was consolidated from two closely related cases, one against the Environmental Protection Agency, and the other against the Air Force, seeking to compel compliance with hazardous waste inventory, inspection, and disclosure responsibilities at a secret installation in Nevada. *Kasza*, 133 F.3d at 1162. During the discovery phase of the litigation, the Air Force refused to furnish almost all of the information sought by the plaintiffs, claiming it was privileged because enemies of the United States could determine what secret activities the Air Force was conducting if information associated with the operation was disclosed. *Id.* at 1163. The district court granted summary judgment in favor of the Air Force, finding that the formal invocation of the state secrets privilege

blocked the discovery requested and made trial impossible by effectively preventing the plaintiffs from establishing a *prima facie* case for any of their claims. *Id.* at 1162-63.[3] We affirmed. *Id.* at 1163.

In *Kasza*, we relied on the *Reynolds* rule that "the state secrets privilege is a common law evidentiary privilege that allows the government to deny discovery of military secrets." *Id.* at 1165. After reviewing the applicable law, we reasoned that the application of the state secrets privilege can have different effects, depending on whether it is used to exclude evidence or to dismiss a cause of action. *Id.* at 1166. First, we found that the government's invocation of the privilege over particular evidence may completely remove the evidence from the case. *Id.* If a plaintiff cannot make out her *prima facie* case without the secret evidence, the court may dismiss her claim. *Id.* Second, the privilege may deprive a defendant of information that would otherwise give the defendant a valid defense to the claim. *Id.* In these cases, the court may grant summary judgment to the defendant. *Id.*

In the first two categories, before the state secrets privilege can be applied in an otherwise justiciable case, there must be a formal claim of privilege followed by judicial review to determine whether the circumstances are appropriate for its invocation. *Id.* at 1165-66. After the court has decided what evidence is unavailable as a result of the application of the privilege, the court must determine whether the plaintiff is still able to establish a *prima facie* case or whether the defendant can prove up a defense in light of the court's exclusionary ruling.

[3] The district court dismissed the second case as moot. *See Kasza*, 133 F.3d at 1163.

Id. at 1166. In *Kasza*, we found that the plaintiffs' RCRA claims could not be proven without the documents withheld as privileged, and therefore summary judgment was appropriate. *Id.* at 1170 ("[T]he state secrets privilege bar[s] [the plaintiffs] from establishing [a] *prima facie* case . . . .").

Finally, we addressed the third category of cases where the "very subject matter of the action" is a state secret. *Id.* at 1166. We found that in these cases there is no need to evaluate a plaintiff's ability to produce nonprivileged evidence. Instead, "the court should dismiss [a] plaintiff's action based solely on the invocation of the state secrets privilege." *Id.*

The third category recognized in *Kasza* is controlled by *Totten*. In defining this category of cases, we cited *Reynolds's* footnote 26, where, as discussed above, the Supreme Court expressly distinguished the *Totten*-type cases from other cases involving the state secrets privilege. *Kasza*, 133 F.3d at 1166. We also cited *Totten's* broader public policy holding. *Id.* We recognized that this category includes those cases where the subject matter of the suit is itself a state secret requiring dismissal. *Id.* In these cases, as soon as it becomes obvious to the court that the action is simply not justiciable, the case is dismissed. Dismissal can occur even before the court resolves evidentiary issues or discovery disputes implicating the plaintiff's ability to establish a *prima facie* case. *Reynolds*, 345 U.S. at 11 n.26, 73 S. Ct. 528; *Kasza*, 133 F.3d at 1166 (citing *Totten*, 92 U.S. at 107); *see also In re United States*, 872 F.2d 472, 478 (D.C. Cir. 1989) (noting with approval the district court's order distinguishing cases where the subject matter of the litigation is a state secret from

those where the discovery requested is the state secret).

We concluded that the plaintiffs' discovery in *Kasza* was not only barred by the state secrets privilege, which prevented them from establishing their *prima facie* case justifying dismissal, but also that the plaintiffs' claims fell into the third category of cases represented by *Totten* because the Air Force could neither "confirm or disprove that any hazardous waste had been generated, stored, or disposed of at the operating location." *Kasza*, 133 F.3d at 1163, 1170.

The majority stretches the court's holding in *Kasza* beyond its logical bounds to find that "[i]t is therefore the law of this circuit that *Totten* permits dismissal of cases in which it is asserted that the very subject is a state secret only *after* complying with the formalities and court investigation requirements that have developed since *Totten* within the framework of the state secrets doctrine." Maj. Op. at 1150 (emphasis in original).

Kasza neither announced nor applied such a rule. While the *Kasza* court chose to rule on the *Totten* issue after it ruled on the state secrets privilege, nothing in *Kasza* suggests that judicial review of *Totten*-type claims is mandated. Instead, the *Kasza* court specifically identified the *Totten*-type of cases as a separate type of case where dismissal may be appropriate on the pleadings. *Kasza* makes clear that in the third category of cases "the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege" without the judicial balancing required in the discovery-type cases. *Kasza*, 133 F.3d at 1166. *Kasza's* reliance on *Reynolds's* footnote 26 for support further

compels the conclusion that no judicial determination need be made before applying the jurisdictional bar announced in *Totten*. *Kasza*, 133 F.3d at 1166.

After a careful review of Supreme Court case law, as well as our own holding in *Kasza*, I conclude the state secrets privilege announced in *Reynolds* does not limit or modify *Totten* or its bar on judicial review of cases where the subject matter of the lawsuit is a state secret. Rather, *Totten* continues to permit a court to determine that the subject matter of a suit is beyond judicial scrutiny and may properly be dismissed at the pleading stage. *See Reynolds*, 345 U.S. at 11 n.26, 73 S. Ct. 528; *Kasza*, 133 F.3d at 1166. Other courts have come to the same conclusion. *See Guong* v. *United States*, 860 F.2d 1063, 1066 (Fed. Cir. 1988) ("A close reading of *Reynolds* reveals that it does not limit or modify the authority of *Totten* or its rationale."). While the Supreme Court certainly could have supplanted *Totten* with *Reynolds*, it did not, and the majority should not do so in this case.

II

The majority opinion also errs in limiting the application of *Totten* to contract claims. While such a limitation is necessary to reach the result the majority is determined to announce in this case, the holding in *Totten* belies such a confined application. Rather, the rule announced in *Totten* extends to claims for tort or constitutional violations arising from the secret contractual relationship.

The district court acknowledged that proof of the existence of a contract for secret services between the Does and the CIA was a fact under *Totten* that would

have precluded the continuation of this litigation. In an attempt to narrow the application of the *Totten* bar, however, the district court declared that "[r]egardless of whether a secret contract does exist, there are substantial issues and claims remaining in this case that lie outside the reach of *Totten*." *Doe* v. *Tenet*, 99 F. Supp. 2d 1284, 1289 (W.D. Wash. 2000). The district court reasoned that

> [the Does] may be able to base their entitlement to receipt of the CIA's monetary stipend on theories other than contract. For example, if plaintiffs are able to prove that they had an entitlement to benefits based on a promissory or equitable estoppel theory, or if there is a regulatory or statutory basis for their entitlement, then they may be able to show a constitutionally protected property interest, regardless of *Totten*.

Id. at 1291 (footnote omitted).

The district court's limitation of *Totten* to contracts for secret services finds no support in *Totten* or its progeny. See, e.g., *Weinberger* v. *Catholic Action of Hawaii/Peace Ed. Project*, 454 U.S. 139, 146-47, 102 S. Ct. 197, 70 L. Ed. 2d 298 (1981) (applying *Totten* to a National Environmental Policy Act claim); *Guong*, 860 F.2d at 1065 (applying *Totten* to bar claim for failure to rescue); *Fitzgerald* v. *Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1241-42, 1244 (4th Cir. 1985) (citing *Totten* in support of dismissal of libel action); *Kielczynski* v. *CIA*, 128 F. Supp. 2d 151, 162-63 (E.D.N.Y. 2001) (rejecting argument that constitutional claims arising from contract for secret services fall outside of *Totten* doctrine), *aff'd sub nom. Kielczynski* v. *Does 1-2*, No. 01-6103, 2003 WL 187164 (2d Cir. Jan. 23, 2003) (unpublished

disposition). *Totten* itself did not limit its holding to those cases involving contracts for secret services. Instead, the Court held that "public policy forbids the maintenance of *any* suit in a court of justice, the trial of which would inevitably lead to the disclosure of *matters* which the law itself regards as confidential." 92 U.S. at 107 (emphasis added). The Court did not limit its holding to those circumstances where a secret *contract* must be revealed. Rather, the Court held, much more generally, that the maintenance of a suit is forbidden where *any matter* which the law regards as confidential would have to be disclosed. *Id.*

The breadth of the *Totten* doctrine is demonstrated in its application in *Weinberger* v. *Catholic Action of Hawaii/Peace Ed. Project*, 454 U.S. at 146-47, 102 S. Ct. 197. In *Weinberger*, the Supreme Court reversed our holding that the Navy could be required to prepare and release a "hypothetical" environmental impact statement with regard to the operation of one of its Hawaiian magazines capable of storing nuclear weapons. *Id.* at 140, 147, 102 S. Ct. 197. The Supreme Court observed that because the locations of nuclear weapons storage facilities were classified for national security reasons, "the Navy [could] neither admit nor deny that it propose[d] to store nuclear weapons at [the Hawaiian facility]." *Id.* at 146, 102 S. Ct. 197.

In holding that the Navy was therefore not required to prepare a "hypothetical" environmental impact statement, since it would necessarily result in the disclosure of classified information, the Court concluded that the degree of the Navy's compliance with the relevant environmental statutes was a matter "beyond judicial scrutiny." *Id.* Citing *Totten*, the Court concluded that

the maintenance of this suit was forbidden since the case involved a matter which the law itself regards as confidential. *Weinberger*, 454 U.S. at 146-47, 102 S. Ct. 197.

These cases illustrate that the *Totten* doctrine applies to the facts of this case regardless of whether the Does' claim is based on a secret contract with the CIA or on other theories of relief that necessarily involve the disclosure of that secret relationship. Clever pleading cannot evade a clear prohibition.

As with a claim sounding strictly in contract, a claim based on theories of estoppel would require the Does to actually demonstrate a relationship with the CIA. It would require that the Does prove, for instance, a binding representation made by the CIA to the Does on which they relied to their detriment. But the very existence of such a relationship or implied contract for secret services between the Does and the CIA is a secret that cannot be disclosed, since disclosure of this fact would inevitably "compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent." *Totten*, 92 U.S. at 106.

Any attempt to demonstrate a regulatory or statutory basis for an entitlement to benefits from the CIA must fail for the same reason. Even assuming that the Does could demonstrate that either the statutory language of Section 403h, the statute from which the term "PL-110" is derived, or the regulations regarding the support provided to former PL-110 resettlees, actually mandate the relief requested, they would still have to prove that they were indeed individuals classified as

PL-110s.[4] That is, the Does would have to show that a relationship or an agreement existed between themselves and the CIA that would entitle them to seek relief under these specific statutes and regulations for the benefits they now claim.

The district court also found that the Does "have sufficiently stated a claim that the government violated their substantive due process rights by creating a special relationship with plaintiffs and then failing to provide for their basic needs and protect them from deprivations of liberty, or by affirmatively placing them in danger." *Doe* v. *Tenet*, 99 F. Supp. 2d at 1293. The Does could, as a general matter, assert a violation of their due process rights if (1) the CIA created a special relationship with them and thereafter abused that special relationship, or (2) if the CIA affirmatively placed the Does in danger. See *L.W.* v. *Grubbs*, 974 F.2d 119,

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[4] In any event, it is unlikely that the Does would be able to demonstrate that either Section 403h or the regulations regarding so-called PL-110s mandate such relief. Section 403h simply provides that in his discretion, the Director of Central Intelligence ("DCI") may admit aliens into the United States for permanent residence "without regard to their inadmissibility under the immigration or any other laws and regulations." 50 U.S.C. § 403h. Nothing in the language of the statute itself even alludes to the provision of support, financial or otherwise, by the CIA or any other governmental agency. Further, the regulations provided to us demonstrate that although the CIA may have granted some benefits and support to others alleged to have been PL-110s, none of those regulations mandate the provision of such support. In fact, the regulations clearly indicate that the amount and extent of support provided is wholly within the discretion of the DCI and may be terminated at any time. To illustrate, a redacted 1990 internal CIA Regulation noted that the Agency's support "normally terminates when [an alien] acquires citizenship in our Country, but may be terminated earlier."

121 (9th Cir. 1992). To succeed on their substantive due process claim, the Does would have to establish either that a relationship with the CIA in fact existed or that the CIA affirmatively placed them in danger. This they cannot do, for "the employment and the service were to be equally concealed." *Totten*, 92 U.S. at 106.

III

Totten bars judicial review of cases arising out of secret contracts for espionage services even where the plaintiff alleges national security is no longer at risk because there has been public acknowledgment of the contract. Unlike the majority, I have no difficulty rejecting the plaintiffs' invitation to second-guess the DCI's determination of what information remains harmful to national security or otherwise embarrassing to the federal government.[5]

The highest judicial deference is owed to the DCI's determination that disclosure of the relationship between the Does and the CIA would pose a threat to national security. *See* 50 U.S.C. § 403-3 (providing that as part of its responsibilities, the DCI shall "protect intelligence sources and methods from unauthorized

[5] I reject the majority's view that judicial review of secret contracts for espionage services may actually enhance national security. According to the majority, if suppliers of military and espionage-related goods and services come to expect that promises cannot be enforced, their willingness to offer their services may in the long run dissipate. Maj. Op. at 1152. But such a policy determination is not ours to make. Rather, that decision is entrusted to the Executive Branch. The better rule is to dismiss such cases at the outset of the litigation without forcing an acknowledgment by the government and before any of the forbidden details can inadvertently come to light.

disclosure"). As the Supreme Court has declared, "Congress intended to give the Director of Central Intelligence broad power to protect the secrecy and integrity of the intelligence process. The reasons are too obvious to call for enlarged discussion; without such protections the Agency would be virtually impotent." *CIA* v. *Sims*, 471 U.S. 159, 170, 105 S. Ct. 1881, 85 L. Ed. 2d 173 (1985).

In *Sims*, the Supreme Court aptly observed that judges are ill-suited to evaluate these secrecy considerations:

> We seriously doubt whether a potential intelligence source will rest assured knowing that judges, who have little or no background in the delicate business of intelligence gathering, will order his identity revealed only after examining the facts of the case to determine whether the Agency actually needed to promise confidentiality in order to obtain the information. . . . Moreover, a court's decision whether an intelligence source will be harmed if his identity is revealed will often require complex political, historical, and psychological judgments.
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> * * *

And it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process. *Id.* at 176, 180, 105 S. Ct. 1881.

The Does nevertheless assure the court that litigation of this case would not involve disclosure of any matter that would pose a threat to the nation's security interests, particularly where the espionage activities at issue occurred so long ago.

We should reject the Does' invitation to circumvent *Totten*, a case that itself was not decided until ten years after the end of the Civil War and, presumably, until after the need for secrecy had subsided. Instead, we would be well advised to adopt the rule set forth by the Federal Circuit in *Guong*, holding that "it cannot be doubted that *Totten* stands for the proposition that no action can be brought to enforce an alleged contract with the government when, *at the time of its creation*, the contract was secret or covert." *Guong*, 860 F.2d at 1065 (emphasis added). The Does' argument must fail because, as the Federal Circuit recognized, "what may seem historical trivia to [the plaintiff] may be of great moment to the government, which has a much broader view of the world scene." *Id.* at 1066.

Nor do I find persuasive the plaintiffs' argument that the existence of ambiguous correspondence allegedly exchanged between the parties transform their secret arrangement into a public one. *See id.*; *see also* *Mackowski* v. *United States*, 228 Ct. Cl. 717, 719 (1981) (rejecting the same argument and finding that speculation is not equivalent to public disclosure). To protect this country's legitimate interest in maintaining its national security, the existence of the alleged relationship between the Does and the United States is itself a

fact not to be disclosed, and without this fact the case may not proceed.[6]

IV

Also unpersuasive is the majority's reliance on modern judicial proceedings designed to protect confidential information from disclosure during the course of litigation, such as *in camera* proceedings, to save the Does' claims from dismissal. The district court quoted *Webster* v. *Doe*, 486 U.S. 592, 604, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988), to support its assertion that district courts have "latitude to control any discovery process which may be instituted so as to balance [plaintiffs'] need for access to proof which would support a colorable constitutional claim against the extraordinary

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[6] A broader reading of *Totten* is consistent with the Supreme Court's recognition of the public policy interest in, and the critical need for, secrecy in the intelligence field. Reviewing the congressional hearing testimony of Allen Dulles, the CIA's third DCI, and of Air Force General Vandenberg in support of the National Security Act of 1947, the Court in *Sims*, 471 U.S. at 171-172, 172 n.16 (1985), quoted none other than George Washington on the need for complete secrecy in this sensitive area of government operations:

> Secrecy is inherently a key to successful intelligence operations. In the course of issuing orders for an intelligence mission, George Washington wrote to his agent:
>
> "The necessity of procuring good intelligence, is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprises of the kind, and for want of it they are generally defeated . . . ." 8 Writings of George Washington 478-479 (J. Fitzpatrick ed. 1933) (letter from George Washington to Colonel Elias Dayton, July 26, 1777).

needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Doe* v. *Tenet*, 99 F. Supp. 2d at 1290 (quoting *Webster*, 486 U.S. at 604, 108 S. Ct. 2047). The district court noted that the CIA could also "request leave to submit materials in this matter under seal or *in camera*, or may assert the state secrets privilege recognized in [*Reynolds*]." *Id.* The district court and the majority's reliance on *Webster* and *Reynolds* is misplaced.

In *Webster* a discharged CIA employee filed a claim against the CIA alleging that he was fired because of his homosexuality. 486 U.S. at 595-96, 108 S. Ct. 2047. In an opinion where the majority never cited *Totten*, the Supreme Court held that, although the Director's discretionary decision to discharge an employee for national security reasons was not subject to judicial review under the Administrative Procedure Act, *id.* at 601, 108 S. Ct. 2047, the discharged employee's constitutional claims were judicially reviewable. *Id.* at 603-04, 108 S. Ct. 2047. The *Webster* Court reasoned that in enacting the relevant statute, Congress did not mean to impose restrictions denying courts the authority to resolve constitutional claims arising from the DCI's termination decisions. *Id.* at 604, 108 S. Ct. 2047. The *Webster* Court recognized that "claims attacking the hiring and promotion policies of the [CIA] are routinely entertained in federal court. . . ." *Id.* The Court also reasoned that the employee's claims stemmed from the existence of the employment relationship and the information sought involved the "same sort of rummaging" found in employment cases. *Id.* In those circumstances, the Court concluded, the district court had the latitude to balance the plaintiff's need for access to

proof with the government's need for confidentiality. *Id.*

Unlike the case at hand, *Webster* did not involve disclosure of the type of secret agreement that would preclude litigation under *Totten*. There is a difference between the domestic employment of Agency workers and foreign spies. It is no secret that federal employees work for the CIA in a variety of sensitive positions. Terminating one for an alleged impermissible reason is the grist of many labor and employment lawsuits. To the contrary, the Does cannot even establish the existence of their secret employment without running afoul of *Totten*. The "sort of rummaging" permissible in *Webster* is intolerable in cases controlled by *Totten*. *Weinberger*, 454 U.S. at 147, 102 S. Ct. 197 (citing *Totten*, 92 U.S. at 107).

The district court's reliance on *Reynolds* as authority to conduct *in camera* proceedings after forcing the government to answer the Complaint, thereby revealing the secret fact of employment, is likewise misplaced. The *Reynolds* Court held that when this is the case we should not jeopardize national security by "insisting upon an examination of the evidence, *even by the judge alone, in chambers*." *Reynolds*, 345 U.S. at 10, 73 S. Ct. 528 (emphasis added). *Reynolds* recognized that in those situations described by *Totten* as "inevitably lead[ing] to the disclosure of matters which the law itself regards as confidential," *Totten*, 92 U.S. at 107, no amount of judicial oversight is sufficient to protect the national security interests at stake.

V

Although I do not think it is necessary to the resolution of this case, I note that even if the Does' claims could somehow overcome the *Totten* bar (which they cannot), the Tucker Act, 28 U.S.C. § 1491(a)(1), requires the Does to bring this case in the Court of Federal Claims.

The Tucker Act grants exclusive jurisdiction to the Court of Federal Claims for suits against the United States whenever an action seeks money damages or arises from an express or implied contract. 28 U.S.C. § 1491(a)(1); *Demontiney* v. *United States ex rel. Dept. of Interior*, 255 F.3d 801, 810 (9th Cir. 2001).[7] This jurisdictional limitation extends to constitutional claims against the United States that are dependent on rights provided under a government contract. *Tucson Airport Auth.* v. *Gen. Dynamics Corp.*, 136 F.3d 641, 647 (9th Cir. 1998) (holding when constitutional claims are premised on the notion that the United States has some contractual obligation to the plaintiff that it has failed to satisfy, the claims are contractually based and must be heard in the Court of Federal Claims); *North Star Alaska v. United States*, 14 F.3d 36, 37 (9th Cir. 1994) (holding if a plaintiff's claim is concerned with rights

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[7] The Tucker Act grants jurisdiction to the Court of Federal Claims:

> to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1).

created within the contractual relationship, it falls within the Tucker Act).

The majority seeks to avoid this second jurisdictional obstacle by cleverly dissecting the Does' claims and recasting some of them as independent of the underlying contract. For example, the majority finds that the Does may have a liberty or due process claim outside of the Tucker Act because they allege that the CIA placed them in danger by bringing them to this country, providing them with false identities, and then failing to take care of them when Mr. Doe lost his job. The Does' "intentional endangerment" claim, however, is nothing more than a claim that the United States failed to provide for the Does as required by the parties' alleged agreement.

In the absence of an agreement with the government, the Does would have neither a false history nor an expectation of governmental aid. If the government owed the Does any duty at all, the source of that duty must be the alleged contract. *Tucson Airport Auth.*, 136 F.3d at 647 (finding claim contractually based where "[the] duty, if it exists, derives from the contract"); see also *Up State Federal Credit Union* v. *Walker*, 198 F.3d 372, 377 (2d Cir. 1999) (finding that the parties' dispute was contractual in nature and subject to the Tucker Act because, had the parties not entered into the contract, the plaintiff would have no claim against the government); *Kielczynski*, 128 F. Supp. 2d at 160 (rejecting a former covert employee's argument that the source of his rights was the due process clause and finding instead that his cause of action was ultimately based on his contract with the CIA).

Likewise, the Does' due process claim—declaring that the Does seek only to compel "a constitutionally adequate hearing in which to adjudicate their rights" —is based on the their alleged secret contract with the CIA. In *Kielczynski*, a factually indistinguishable case, a district court rejected the same due process argument the Does raise here. 128 F. Supp. 2d at 160- 61. There, the plaintiff, who had been a former spy for the CIA, argued that the CIA's failure to conduct an adequate hearing in order to determine whether he was entitled to additional benefits violated the due process clause. *Id.* at 160. In that case, the court had no problem holding that the Tucker Act precluded it from exercising jurisdiction over the plaintiff's claim because "the very existence of the alleged due process claim hinge[d] on the existence of[the] contract."[8] *Id.* at 161, *aff'd sub nom. Kielczynski* v. *Does 1-2*, 2003 WL 187164 (2d Cir. Jan. 23, 2003) (unpublished disposition).

The Does' claim that CIA regulations and procedures entitle them to continued support as persons brought into the United States pursuant to the PL-110 program is also contractually based. The Tucker Act's jurisdictional grant includes claims upon any implied contract with the United States. The Does' PL-110 status claim is nothing more than an assertion that abstract CIA procedures, combined with the Does' status as participants in the PL-110 program, create an implied contractual obligation to pay them additional monetary support.

Finally, the Does' estoppel claim is contractually based because it depends on their ability to prove that

[8] The *Kielczynski* court specifically rejected the reasoning of the district court in this case. *Id.* at 161.

the CIA entered into an agreement upon which it intended, or the Does rightfully believed that it intended, the Does to rely. See *Watkins* v. *United States Army*, 875 F.2d 699, 710 (9th Cir. 1989). The Does' estoppel claim ultimately rests on their allegation that they entered into an agreement with the CIA, the Does satisfactorily performed their end of the bargain, and the CIA thereafter failed to perform as promised. Under our case law, the Does' estoppel claim is contractually based and must be heard in the Court of Federal Claims. *Tucson Airport Auth.*, 136 F.3d at 647-48; *North Star Alaska*, 14 F.3d at 37.

We lack the power to exercise subject matter jurisdiction when Congress has given it to another court. The Does should not be permitted to evade the valid jurisdictional limitations of the Tucker Act by labeling their action as something other than what it truly is: a breach of contract claim.

VI

There has been no change in the law of spy contracts since *Totten* was decided in 1875. The secret existence of the espionage relationship and a claim for greater compensation was not justiciable then; it is not justiciable now. Once it is clear that the plaintiff's action is controlled by *Totten*, no further proceedings are required and we must dismiss the case. The law for this class of cases has remained constant for 128 years.

We cannot avoid our obligation to follow *Totten* by suggesting that somehow the law has evolved to a point where the unequivocal rule announced therein is no longer necessary. *Totten* has not been supplanted by procedural rules enacted by Congress in order to

protect confidentiality during the discovery phase of litigation under congressionally created causes of action. Unless the Supreme Court revisits *Totten* or Congress provides a new statutory remedy to further compensate former spies, we are required to abide by the Court's holding that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential. . . ." 92 U.S. at 107; see, e.g., *Landrigan* v. *Stewart*, 272 F.3d 1221, 1229 (9th Cir. 2001) ("[W]e must leave it to the [Supreme] Court to overrule its own cases, if and when it decides to do so."); *Hart* v. *Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) ("Binding authority must be followed unless and until overruled by a body competent to do so.").

Proof of the existence of a contract for secret services or of a secret espionage relationship with the CIA is "itself a fact not be disclosed." *Totten*, 92 U.S. at 107. Because "[t]he secrecy which such contracts impose precludes any action for their enforcement," *id.*, the Does' lawsuit is not justiciable under *Totten*. Even if the Does' suit could be heard in federal court, the Tucker Act mandates that it be filed in the Court of Federal Claims. Because the court's opinion fails to adhere to the jurisdictional limitations announced by the Supreme Court and enacted by Congress, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-35419

JOHN DOE AND JANE DOE, PLAINTIFFS-APPELLEES

v.

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

[Jan. 7, 2004]

ORDER

Before: CANBY, BERZON and TALLMAN, Circuit Judges.

Dissent by Judge KLEINFELD.

The majority of the panel has voted to deny appellee's petition for rehearing and petition for rehearing en banc. Judge Canby votes to deny the petition for rehearing and recommends denial of the petition for rehearing en banc. Judge Berzon votes to deny the petition for rehearing and the petition for rehearing en banc. Judge Tallman votes to grant the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. An active judge requested a vote on whether this matter should be reheard before an en banc panel. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc reconsideration. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

KLEINFELD, Circuit Judge, with whom Circuit Judges KOZINSKI, O'SCANNLAIN, TALLMAN, BYBEE and CALLAHAN join, dissenting from denial of rehearing en banc:

I respectfully dissent from the order denying rehearing en banc.

"Doe" is a pseudonym, because Mr. and Mrs. Doe were apparently spies for the United States in the Soviet empire. Of course, all we know is what the Does now allege. The facts are unconfirmed. The case comes up on an interlocutory appeal of a district court order denying the CIA's motion to dismiss.

Mr. Doe was a diplomat for one of the "republics." He sought to defect to the United States. He and Mrs. Doe allegedly made a deal with the CIA. Mr. Doe would stay in his position for a while and spy for us, and the CIA would then arrange the Does' defection and resettlement, and ensure their personal and financial security for the rest of their lives. All went fine for some time, with false identities and backgrounds. But then the American bank Mr. Doe worked for in Seattle merged with another, and Mr. Doe was laid off. The CIA left him without assistance, despite an earlier promise to resume financial aid if he became unemployed. The Does sued for an order directing the CIA

to provide them with due process and to pay them the money they were promised.

The issue is whether they can get into a federal district court with their claims. The long-established answer, under the Supreme Court's opinion in *Totten* v. *United States*,[1] has been that they cannot. Under *Totten*, those who spy for us cannot bring lawsuits to enforce our intelligence agencies' promises, because that would require exposure of matters that must be kept secret in the interest of effective foreign policy. The panel opinion effectively overrules *Totten*. It holds that *Totten's* rationale is out of date and that subsequent Supreme Court decisions undermine it. Under *Agostini* v. *Felton*,[2] we cannot do that. Also, in reaching its conclusion, the panel decision puts us is in conflict with the Federal Circuit, which complied with *Totten* in *Guong* v. *United States*.[3]

Aside from the intelligence aspect of this case, the Tucker Act requires those who sue the government for broken promises to do so in the Court of Federal Claims, not in a district court.[4] By allowing the Does' suit to go forward despite the Tucker Act, the panel opinion departs from our precedent in an area where there already existed an intercircuit conflict.

I. *Spies*

The case at bar is factually indistinguishable from *Totten*. In 1861, Abraham Lincoln, on behalf of the United States, personally hired William A. Lloyd to spy

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[1] *Totten* v. *United States*, 92 U.S. 105, 23 L. Ed. 605 (1875).

[2] *Agostini* v. *Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997).

[3] *Guong* v. *United States*, 860 F.2d 1063 (Fed. Cir. 1988).

[4] See 28 U.S.C. § 1491(a).

behind Confederate lines for the duration of the war, agreeing to pay him $200 a month for his services.[5] Lloyd subsequently died intestate, and his administrator, Totten, sued the government in the Court of Claims for Lloyd's unpaid compensation. The Supreme Court held, in the broadest terms, that contracts for clandestine service to the government can never be sued upon. It said that such agreements necessarily contain the term that the parties' "lips . . . were to be for ever sealed," a term that is "implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations."[6] Here is the heart of the Court's holding:

> Our objection is not to the contract, but to the action upon it in the Court of Claims. The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the

[5] This is in the same order of magnitude as the Does' agreement—$200 in 1861 being the equivalent in purchasing power to about $4,000 today (to the extent that economists' inflation factors can indicate equivalence despite technological change).

[6] *Totten*, 92 U.S. at 106.

> agent. If upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service, with liability to publicity in this way, would be impossible; and, as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery.[7]

The Does' case is factually indistinguishable from *Totten*. Like William Lloyd, the Does were engaged to provide secret services to the United States behind enemy lines. Like Lloyd, they served to the great benefit of the United States in circumstances that could have gotten them killed. And like Lloyd, they allegedly got stiffed by the government providing less compensation than required by the contracts when the time came for the United States to pay up.

The panel held, however, that *Totten* is no longer good authority. As for the contractual aspects of *Totten*, the *Doe* panel held that *Totten* was inapplicable for two reasons:

[7] *Id.* at 106-07.

First, . . . unlike Totten, the Does do not seek only enforcement of a contract. Rather their principal concern at this point . . . is to compel fair process and application of substantive law to their claims within the Central Intelligence Agency[ ]. . . . Second, *Totten* assumed "publicity" inconsistent with the implicit promise of secrecy as inherent in any judicial proceeding and did not consider whether there are means to conduct judicial proceedings without unacceptable attendant "publicity." Since *Totten*, courts, including the Supreme Court, have developed means of accommodating asserted national security interests in judicial proceedings. . . .[8]

The panel then reinterprets the remainder of *Totten* as "an early expression of the evidentiary state secrets privilege," which only allows for dismissal "*after* complying with the formalities and court investigation requirements that have developed since *Totten*."[9]

As Judge Tallman's dissent points out, every aspect of this rationale is mistaken. The most obvious way that the opinion is wrong is that, no matter how much the courts have developed routines for handling assertions of official secrets, a lower court cannot overrule the Supreme Court. Whether subsequent Supreme Court authority implicitly undermines a Supreme Court decision or not, lower courts must follow and apply a controlling Supreme Court decision. As the Court said in *Agostini*, "[w]e reaffirm that if a precedent of this Court has direct application in a case, yet appears to

[8] *Doe* v. *Tenet*, 329 F.3d 1135, 1147-48 (9th Cir. 2003) (internal quotations omitted).

[9] *Id.* at 1149, 1150 (emphasis in original).

rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[10] The Supreme Court can overrule *Totten*. We cannot.

Second, the gossamer distinctions the panel tries to draw between the Does' and Totten's claims for the purpose of defeating *Totten's* language about implied secrecy terms do not amount to anything. Whether it is called a plea for fairer process or a simple contract claim for damages, the Does, like Totten's decedent, sue the government to obtain a remedy for its breach of an agreement to compensate them for intelligence services. In both cases, the engagements were secret, obviously and necessarily so, since doubtless both engagements involved the commission of serious crimes in the locations where the intelligence agents were to perform them. Both also would amount to serious provocations by the United States in the eyes of the governing forces in those locations.

The panel's contention that the purposes of *Totten* can be served by the CIA asserting the state-secrets privilege, which would then permit in camera inspection of papers by the district court and so forth, leaves out the most important purpose of all: to keep the whole engagement utterly and entirely secret. I see no reason that progress in judicial techniques should make any difference. Intelligence is such an ancient part of conflict that the Bible suggested nothing novel when Joshua sent spies to reconnoiter Jericho.[11] Circum-

[10] *Agostini*, 521 U.S. at 237, 117 S. Ct. 1997 (internal quotation omitted).

[11] Joshua 2:1, et seq.

stances have not changed materially. The very existence of the engagement has to be secret and has to remain secret. If a lawsuit is filed but some papers remain secret, that is not enough. An intelligent observer, knowing something of the events, can figure out from the barest indications in a lawsuit what it is all about. As *Totten* says, "such services are sometimes indispensable to the government," and "[a] secret service, with liability to publicity in this way, would be impossible."[12] Sometimes, to avoid provocations to war or other diplomatic imbroglios, the government has to avoid disclosing what it did, even long after it has done it. Spying is among the "matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties."[13]

The panel's assurances that there is nothing to fear are not enough in light of *Totten* and its purposes. Requiring the CIA to abide by the formalities of making a privilege claim will involve the CIA having to deny or disclose the very existence of the secret relationship. Even asserting that there is a secret to protect, as the state-secrets privilege used in other contexts requires, amounts to letting the cat out of the bag. It is such disclosure of the relationship's very existence that *Totten* sought to avoid. And where there is no espionage relationship to protect, the CIA will have to say as much. That will make all non-denials effectively confirmations.

The panel's attempt to interpret *Totten* so narrowly that it does not even apply to a case materially indis-

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[12] *Totten*, 92 U.S. at 107.

[13] *Id.* at 106.

tinguishable from it puts us in conflict with the Federal Circuit. In *Guong* v. *United States*, the plaintiff tried to distinguish *Totten* on the ground that the CIA had hired him as a saboteur in North Vietnam, and not as a spy.[14] The Federal Circuit rejected the distinction and any other narrowing of *Totten*: "*Totten* stands for the proposition that no action can be brought to enforce an alleged contract with the government when, at the time of its creation, the contract was secret or covert."[15]

Guong also rejected the plaintiff's attempt, similar to the Doe panel's, to assimilate *Totten* into cases about the state secrets evidentiary privilege. Privilege cases, including *Webster* v. *Doe*[16] and *United States* v. *Reynolds*,[17] do not involve engagements of spies in foreign countries, but rather disclosures during litigation about other kinds of secrets. As *Guong* held, "[a] close reading of *Reynolds* reveals that it does not limit or modify the authority of *Totten* or its rationale."[18] *Guong* also makes the point that *Totten* is not limited to currently active spies. Even in *Totten*, there was no direct risk of harm from ongoing conflicts, because the Civil War had been over for ten years when the Court decided the case.[19] Thus, in the Federal Circuit, unlike in the Ninth Circuit after *Doe*, *Totten* remains good law.

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[14] *Guong*, 860 F.2d at 1065.

[15] *Id.*

[16] *Webster* v. *Doe*, 486 U.S. 592, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988).

[17] *United States* v. *Reynolds*, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953).

[18] *Guong*, 860 F.2d at 1066.

[19] *See id.* at 1065.

II. *Tucker Act*

The Tucker Act grants jurisdiction to the Court of Federal Claims to hear contract actions against the United States.[20] *Totten* itself was brought under a predecessor to the present Tucker Act.[21] The Tucker Act's conferral of jurisdiction on the Court of Federal Claims has been read to be exclusive of district court jurisdiction when the amount at stake is greater than $10,000.[22]

The panel opinion, however, reads the Tucker Act narrowly, so that even though the Does' claims are in the first instance dependent on the contract, the Does can proceed in district court. The panel so holds because the Does purport to base their claims on a denial of due process and phrase the relief they seek as declaratory and injunctive. Those distinctions have no force, however, as we held in *Tucson Airport*.[23] There is apparently a circuit conflict between *Tucson Airport* and the District of Columbia Circuit's decision in *Transohio Savings Bank* v. *Director, Office of Thrift Supervision*.[24] But this issue should not have been

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[20] *See* 28 U.S.C. § 1491(a)(1).

[21] *See Guong*, 860 F.2d at 1067 (Nichols, J., concurring).

[22] *See Tucson Airport Auth.* v. *Gen. Dynamics Corp.*, 136 F.3d 641, 646 (9th Cir. 1998); see also 28 U.S.C. §§ 1346(a)(2), 1491(a)(1).

[23] *Tucson Airport*, 136 F.3d at 647 ("Because the United States' obligation is in the first instance dependent on the contract, these claims are contractually-based.").

[24] *Transohio Sav. Bank* v. *Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992); *see Tucson Airport*, 136 F.3d at 647-48 ("Notwithstanding the similarities between this case and *Transohio*, to the extent that the teachings of *Transohio* relating to constitutional claims are inconsistent with the ruling case law of this court, we will not follow them.").

reached here, because the case should have been dismissed at the outset because it was based on a covert engagement.

III. *Conclusion*

I sincerely hope that Totten's decedent, William Lloyd, was the only spy the United States has ever failed to pay what it promised (assuming Lloyd was telling the truth), and that the failure occurred only because Lincoln was assassinated before he could see to payment. I hope that the Does' account is fictional (though I do not intimate that it is, having no knowledge). Little could be worse for our ability to engage spies than insecurity about whether they will get what was promised to them. If what the Does allege is true, a serious injustice has been done to them, and the injustice to them is seriously harmful to the long-term security interests of the United States.

Nevertheless, the judicial branch cannot right such a wrong without disclosure of the engagement's existence, which, as *Totten* said, must remain forever secret. It will not do to have word circulating in whatever former Iron Curtain country the Does come from that the collapse of its totalitarian regime was brought about partly by CIA spies and not wholly by its own people's thirst for freedom. Joshua needed spies, Lincoln needed spies, we needed spies to deal with the Soviet empire, and spies will be needed as long as there are men on earth. Judicial determination of what must remain secret, even after in camera inspection of documents, is no substitute for dismissal at the outset, because the CIA cannot come into court and assert the existence of a secret without revealing that there is a secret. The use of spies is far more humane than some

of the alternatives for dealing with serious international conflicts. And their use must remain secret.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Western Washington (Seattle)

No. 01-80052
DC# CV-99-1597-RSL

JOHN DOE, ET AL., RESPONDENTS

v.

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, ET AL., PETITIONERS

[Filed: Apr. 13, 2001]

ORDER

Before: KOZINSKI and RYMER, Circuit Judges

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. Within 10 days of this order, petitioners shall perfect the appeal pursuant to Federal Rule of Appellate Procedure 5(d).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Western Washington (Seattle)

No. 01-80052
DC# CV-99-1597-RSL

JOHN DOE, ET AL., RESPONDENTS

v.

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, ET AL., PETITIONERS

[Filed: Aug. 2, 2001]

ORDER

Before: KOZINSKI and RYMER, Circuit Judges

Respondents' motion to clarify the April 13, 2001, order is granted. The April 13, 2001, order is amended to add the following after the last sentence of the order: "Respondents' cross-petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is denied."

APPENDIX E

UNITED STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C99-1597L

JOHN DOE AND JANE DOE, PLAINTIFFS

v.

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND THE UNITED STATES OF AMERICA, DEFENDANTS

[Mar. 14, 2001]

ORDER GRANTING DEFENDANTS' MOTION FOR AN INTERLOCUTORY APPEAL AND FOR A STAY

This matter comes before the Court on defendants' motion for certification of interlocutory orders and for a stay of further proceedings. For the reasons discussed below, defendants' motion is granted.

I. DISCUSSION

A. Interlocutory Orders

On June 7, 2000, this Court issued an Order denying defendants' motion to dismiss for lack of jurisdiction or alternatively, for failure to state a claim. *See Doe* v.

Tenet, 99 F. Supp. 2d 1284 (W.D. Wa. 2000). On January 22, 2001, this Court denied defendants' motion for summary judgment or alternatively, renewed motion to dismiss. *See* Order dated Jan. 22, 2001. Defendants seek certification for interlocutory appeal of these two orders under 28 U.S.C. 1292(b).

A district court has the discretion to certify interlocutory orders when three conditions are met: (1) the order involves a controlling question of law; (2) there is substantial ground for difference of opinion; and (3) an immediate appeal from the order may advance the ultimate termination of the litigation. *See* 28 U.S.C. 1292(b). The moving party bears the burden of establishing that exceptional circumstances exist that "justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 475 (1978) (internal citation omitted).

A controlling question of law is one that could materially affect the outcome of the case in district court. *See In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1981). Generally, "a difficult central question of law which is not settled by controlling authority" is implicated. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 878 F. Supp. 1078, 1081 (N.D. Ill. 1995) (internal citation omitted). Here, the question of whether the *Totten* doctrine bars plaintiffs' constitutional claims is certainly a controlling question of law. If, as defendants allege, it were deemed that plaintiffs' due process claims are barred because they implicate a contract for secret services which cannot be disclosed, this Court would lack subject matter jurisdiction. The first factor of § 1292(b) is met.

Next, the Court must determine whether a substantial ground for difference of opinion exists. Interlocutory appeal should not be utilized merely to provide review of a ruling in "hard cases." *United States Rubber Co.* v. *Wright*, 359 F.2d 784, 785 (9th Cir. 1966). Substantial grounds for difference of opinion may be demonstrated by conflicting opinions of courts that have interpreted the same legal issue. *See Dorward* v. *Consol. Rail Corp.*, 505 F. Supp. 58, 59 (E.D. Pa. 1980). Limited case law on an issue is another factor that weighs in favor of establishing substantial ground for difference of opinion. *See Ovando* v. *Los Angeles*, 92 F. Supp. 2d 1011, 1025 (C.D. Cal. 2000).

A recently issued federal opinion disagrees with this Court's holding in *Doe v. Tenet*, 99 F. Supp. 2d 1284 (W.D. Wa. 2000). In *Kielczynski* v. *United States Central Intelligence Agency*, 2001 WL 173322 (E.D.N.Y. Feb. 20, 2001), the plaintiff alleged that he was a former CIA spy and that the CIA breached his employment contract regarding citizenship and health benefits. He alleged that his due process rights were violated because he did not receive a hearing prior to the termination of his contract. The *Kielczynski* court discussed the instant case and declined to adopt its holding that plaintiffs' due process claims could go forward. *See id.* at *9 (*citing Doe* v. *Tenet*, 99 F. Supp. 2d at 1287). It did not believe that the reasoning of *Doe v. Tenet* was consistent with the view of the Second Circuit or with the *Totten* doctrine.

While this Court recognizes that there are substantial factual differences between *Kielczynski* and the case at bar, the particular legal questions as to whether *Totten* bars the constitutional claims of former CIA spies is similar. The Ninth Circuit may take a less

or more expansive view on the application of the *Totten* doctrine to plaintiffs' constitutional claims. The existence of conflicting opinions and that lack of a precedential case on point demonstrates a substantial ground for difference of opinion.

Finally, the Court must determine whether an interlocutory appeal will materially advance the termination of litigation. The central issue is whether a reversal would obviate the need for a trial. *See Nobell, Inc.* v. *Sharper Image Corp.*, 1992 U.S. Dist. LEXIS 20114, *10 (N.D. Cal. June 12, 1992). If the Ninth Circuit were to find that plaintiffs' claims were barred by the *Totten* doctrine, a reversal of this Court's orders would likely result in a dismissal of plaintiffs' claim. This factor is satisfied. Defendants have met their burden of establishing the exceptional circumstances exist in this case that warrant the certification of this Court's orders for interlocutory appeal.[1]

Stay of District Court Proceedings

When a stay is requested, the Court must consider the competing interest that will be affected by the grant or denial of a stay. Those interests include the possible damage that may occur from granting the stay, the hardship which a party may suffer if required to go forward, and other concerns of justice in terms of simplifying or complicating issues, proof, and questions of law. *See Filtrol Corp.* v. *Kelleher*, 467 F.2d 242, 244 (9th Cir. 1973).

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[1] Contrary to plaintiffs assertions, it is not necessary for defendants to invoke the state secrets privilege to establish exceptional circumstances. It is clear to the Court that this case involves potentially sensitive information and the criteria of 1292(b) are met. This is sufficient to show exceptional circumstances.

Plaintiffs argue that a stay would only prolong this litigation, which would harm plaintiffs who are old and in ailing health. Plaintiffs urge the Court to deny the stay because defendant can seek protection of sensitive discovery materials by requests to the Court or by invoking the state secrets privilege. If this case went forward, defendants argue that filing an answer to plaintiffs' complaint and partaking in discovery could cause great risk of harm to national security.

The Court finds that it would be an inefficient use of judicial and attorney resources to allow discovery to continue, because the Ninth Circuit's decision in this case could negate the need for discovery. This case is stayed pending a decision from the Ninth Circuit on the interlocutory appeal of this Court's Orders.

II. CONCLUSION

For the foregoing reasons, defendants' motion for interlocutory appeal of this Court's June 7, 2000 and January 22, 2001 Orders is GRANTED.[2] Defendants' request for a stay is GRANTED pending the outcome of the interlocutory appeal. The Clerk of the Court is

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[2] Plaintiffs requested that the *Totten* issue be certified for appeal, rather than the entirety of bother orders. However, once a district court certifies any question of law for interlocutory appeal, the appellate court may exercise jurisdiction over any issue included within the order. Jurisdiction applies to the order and not to a particular question certified by the district court. *See Yamaha Motor Corp.* v. *Calhoun*, 516 U.S. 199 (1996).

directed to send copies of this order to all counsel of record.

DATED this 14th day of March, 2001.

/s/ ROBERT S. LASNIK
ROBERT S. LASNIK
United States District
Judge

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C99-1597L

JOHN DOE AND JANE DOE, PLAINTIFFS

v.

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND THE UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Jan. 22, 2001]

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, RENEWED MOTION TO DISMISS

The Court already has described the facts and the procedural history of this case in its June 7, 2000 Order ("Order"). See *Doe* v. *Tenet*, 99 F. Supp. 2d 1284 (W.D. Wa. 2000). Defendants renew their motion under Federal Rule of Civil Procedure 12(b)(1) to dismiss for lack of subject matter jurisdiction. They also moved for summary judgment under Federal Rule of Civil Procedure 56(c), alleging that there are no disputed material facts regarding plaintiffs' claims of deprivation of property and liberty rights without due process. For

the reasons stated below, the Court denies these motions.

I. DISCUSSION

A. Renewed Motion to Dismiss[1]

Defendants argue that plaintiffs' claims should be dismissed for lack of subject matter jurisdiction because the *Totten* doctrine bars all claims, contract or otherwise, regarding the enforcement of secret agreements with the government.[2] See *Totten* v. *United States*, 92 U.S. 105 (1875). Defendants' arguments that the primary basis of plaintiffs' case is a secret agreement and that the litigation of plaintiffs' case therefore jeopardizes national security is unpersuasive. It is true that federal courts lack the jurisdiction to review a national security issue, such as the Navy's revocation of security clearance for one of its employees. See *Brazil* v. *United States Dep't of the Navy*, 66 F.3d 193, 196 (9th Cir. 1995). It is also true that federal courts should not review government decisions once a formal claim of states secret privilege has been invoked. See *United States* v. *Reynolds*, 345 U.S. 1, 5 (1953).[3]

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[1] Plaintiffs contend that defendants' motion is a thinly disguised motion for reconsideration, rather than a renewed motion to dismiss. Defendants disagree but do argue that even if this motion were a motion for reconsideration, it would "pass[] muster" because this Court's ruling on *Totten* was in plain error.

[2] Defendants repeat several *Totten*-based arguments in their renewed motion that the Court has already discussed in its Order. The Court will not revisit these arguments.

[3] Defendants argue that there is no need to invoke the privilege, and refer to footnote 26 of *Reynolds*, in which the Court states that the privilege has not been formally invoked in cases where "it was so obvious that the actions should never prevail over the privilege." In the instant case, it is not obvious that military

However, this case is not like *Brazil*, where a national security issue was involved, or *Reynolds*, where the privilege was invoked. Rather, this case concerns plaintiffs' procedural and substantive due process rights with regard to whether plaintiffs are entitled to certain financial, health and other benefits. The constitutional claims of plaintiffs must be balanced against the government interests in confidentiality. See *Webster* v. *Doe*, 486 U.S. 592 (1988).

Accordingly, defendants' renewed motion to dismiss for lack of subject matter jurisdiction is denied.

B. Procedural Due Process

In their first motion to dismiss, defendants claimed not to know what PL-110[4] was. Now, they acknowledge not only the existence of PL-110, but also the existence of CIA internal regulations concerning the PL-110 program and the financial benefits accorded to defectors. CIA internal regulations dated January 15, 1981, June 23, 1981, July 13, 1990, January 4, 1999 and June 25, 1999 show the existence of a CIA policy to provide financial support to defectors.[5] Additionally, a letter from the CIA to the Department of Justice, dated December 12, 1988, states: "Certainly, the CIA believes it has an obligation to support each of its

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secrets or national security are at stake in the Does' attempt to regain financial and other benefits from the CIA.

[4] 50 U.S.C. 403h.

[5] The various regulations have different policies regarding the termination of financial support. For example, the July 13, 1990 regulation states that the CIA's responsibility normally terminates when a defector became a United States citizen. The January 4, 1999 regulation states that the CIA may continue to provide financial support even after citizenship is acquired, if circumstances warrant.

[redacted] for a reasonable period of time and, in some cases, based upon unique circumstances such as illness, age, or indigence, this commitment may be for life." Defendants' initial denial of knowledge of PL-110, followed by their subsequent acknowledgment of PL-110 and related regulations, weaken their credibility.

Defendants have submitted the declaration of William H. McNair, an information review officer for the CIA, to support their contention that while CIA regulations regarding PL-110 may exist, there is no internal or external regulation, statute, policy or practice that *entitles* plaintiffs to lifetime financial benefits.[6] At most, defendants contend the CIA's internal regulations give the CIA director the discretion to allow defectors into the United States and to extend benefits. Therefore, since the allotment of benefits is discretionary, defendants argue that plaintiffs have no enforceable rights to such benefits.

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[6] In a related motion, plaintiffs have moved to strike the following two sentences from the McNair declaration:

> I can inform the court unequivocally that there are *no* Agency or other US federal regulations that require the CIA to provide lifetime subsistence assistance to individuals brought into the United States under the authority of PL-110. Neither PL-110, nor any other law, statute, regulation, internal policy, unstated principle or anything else has ever before, or does now, obligate the Agency to provide any form of lifetime financial assistance to individuals brought into the United States by the CIA under the Authority of PL-110.

McNair Decl. ¶ 5. (emphasis in original). The Court will interpret the first sentence as McNair's declaration that his search revealed no such "Agency or other US federal regulations" that require the CIA to provide lifetime subsistence. The Court will disregard the legal conclusion in the second sentence, regarding the CIA's obligation under any law, statute, policy or principle.

Next, defendants assert that a government agency's internal policies and practices are not binding and do not have the force of law. See *James* v. *U.S. Parole Comm'n*, 159 F.3d 1200, 1205 (9th Cir. 1998). While it is true that the CIA's internal regulations do not have the force of law, plaintiffs' claim of entitlement to financial and other benefits is based not only on the regulations, but also on promises made to them and on the surrounding circumstances. A plaintiff's property right may exist if words, conduct or circumstances indicate a mutually explicit understanding between the parties. See *Perry* v. *Sindermann*, 408 U.S. 593, 600-01 (1972); *Orloff* v. *Cleland*, 708 F.2d 372, 377 (9th Cir. 1983). Here, plaintiffs allege that they were promised lifetime financial benefits by the CIA, and that the payment of such benefits for several years indicates a mutually explicit understanding that a property right existed.[7] Because there are material disputed facts regarding CIA internal regulations, and because plaintiffs can sustain a property right claim under *Sindermann* defendants' motion for summary judgment on the procedural due process property claim is denied.

In addition to a due process claim alleging deprivation of property, plaintiffs allege a deprivation of their liberty without due process. Plaintiffs allege that

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[7] Defendants assert that this Court's Order was incorrect in its statement that plaintiffs have a right to procedural due process because defendants provided an appeals process where it was not mandatory to do so. It is true that a constitutional entitlement cannot be created merely because a state has, in its discretion, granted an appeals process in the past. See *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458, 465 (1981). However, plaintiffs assert a basis for their property interest under *Sindermann* and therefore have a stronger basis for due process than did the plaintiff in *Dumschat*.

they cannot obtain jobs in the United States because the CIA has withdrawn its support in creating and verifying credentials for them. Defendants argue that plaintiffs have no liberty interest, because they are not entitled to the jobs they previously had or jobs they desire to have. However, plaintiffs have not stated that Mr. Doe cannot find a job in the financial industry; their claim is that Mr. Doe cannot find any job without the CIA's support, and that accordingly they are prevented from practicing the "common occupations of life."

Defendants argue next that plaintiffs have not established that their only means of supporting themselves is to leave the United States and work in Eastern Europe. Plaintiffs maintain that they cannot find employment in the United States, and must move to Eastern Europe, where they have relatives and may be hired for their language skills. Viewing the record in the light most favorable to plaintiffs, as Rule 56 requires, plaintiffs' claim for deprivation of liberty interests without due process raises genuine issues of material fact for trial and defendants' motion for summary judgment is denied.

C. Substantive Due Process

Plaintiffs assert a substantive due process claim based on the government's failure to protect them from harm in the event that they must return to Eastern Europe to earn a living.[8] There are two exceptions to the general rule that a state's failure to protect an individual against private violence does not violate due process: (1) when the state takes a person into custody

[8] Plaintiffs fear returning to their native country because they will be recognized as spies by the police or the agents of their country.

and holds the person against his will to ensure his security, or (2) when the state affirmatively places a person in a dangerous situation. See *Huffman* v. *County of Los Angeles*, 147 F.3d 1054, 1059 (9th Cir. 1998).

As for the first exception, defendants argue that plaintiffs were not in physical custody of the CIA at the time of the injury, and therefore have not been deprived of due process. But the Supreme Court has held that a state's affirmative act of restraining an individual's freedom to act may occur "through incarceration, institutionalization, or other similar restraint of personal liberty." *DeShaney* v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1982). Thus, the Court has not held physical custody to be a necessary element of a substantive due process claim. Moreover, the Ninth Circuit has held that when the government places a person in danger by transferring him from his native country to the United States to testify, the government creates a special relationship and owes the person protection from liberty deprivation. See *Wang* v. *Reno* 81 F.3d 808 (9th Cir. 1996). Like the plaintiff in *Wang*, plaintiffs here fear repercussions from their native country because of the services performed for the United States government.

As for the second exception, defendants argue that plaintiffs have not demonstrated the necessary elements of causation and deliberate indifference. Plaintiffs respond that causation of the dangerous situation is clearly shown by the fact that plaintiffs would not fear for their lives if the government had not placed them in danger by forcing them to perform espionage. The fact that the government is the party that allegedly coerced plaintiffs to spy and now will not give plaintiffs

the aid promised, forcing plaintiffs to return to Eastern Europe to face possible injury or death, may well constitute deliberate indifference. Accordingly, defendants' motion for summary judgment on plaintiffs' substantive due process claim is denied.

D. Estoppel

In addition to alleging due process violations, plaintiffs claim that defendants owe them lifetime benefits on theories of promissory and equitable estoppel. Promissory estoppel is available against the government where the government's actions amount to misconduct. *See Watkins* v. *United States Army* , 875 F.2d 699, 706 (9th Cir. 1989). Defendants argue that plaintiffs cannot assert promissory estoppel against the government, because it has not waived its sovereign immunity. However, the cases cited by defendants concern the Tucker Act and secret contracts under *Totten*. *See, e.g. Jablon* v. *United States*, 657 F.2d 1064 (9th Cir. 1981). In it previous Order, the Court addressed these exact arguments and their inapplicability to this case, and there is no need to do so again.

Plaintiffs argue that they can assert equitable estoppel against the government in certain situations. *See Heckler* v. *Cmty. Health Servs.*, 467 U.S. 60-61 (1984) (equitable estoppel available where citizen have interest in "minimum standards of decency, honor, and reliability in their dealings with the government"). Defendants contend that plaintiffs have not sufficiently pleaded the elements of equitable estoppel. Those elements are:

> (1) the party to be estopped knows the facts, (2) he or she intends that his or her conduct will be acted on or must so act that the party invoking estoppel has a right to believe is so intended, (3) the party invoking estoppel must be ignorant of the true facts, and (4) he or she must detrimentally rely on the former conduct. When a party seeks to invoke equitable estoppel against the government, we additionally require a showing that the agency engaged in "affirmative conduct going beyond mere negligence" and that "the public's interest will not suffer undue damage" as a result of the application of this doctrine.

Lehman v. *United States*, 154 F.3d 1010, 1016-17 (9th Cir. 1998) (internal citations omitted). Defendants argue that plaintiffs have not pleaded reliance, nor alleged that the government's conduct went beyond mere negligence, nor demonstrated that its public interest will not be hardened by the application of estoppel.

But an examination of plaintiffs' Second Amended Complaint ("Am. Comp.") demonstrates that plaintiffs have asserted reliance. Am. Comp. ¶¶ 4.4., 4.12, 4.13, 4.16. By alleging that plaintiffs informed the government of the threat they faced if they were to return to Eastern Europe, and that the government arbitrarily rejected their plea for the promised assistance, plaintiffs have alleged more than mere negligence. Am. Comp. ¶¶ 4.22, 5.1, 5.2.. Finally, the public interest will not be harmed. The Court understands the need for confidentiality and has the power to allow motions to be filed under seal and heard in closed hearings. Because there are genuine issues of material fact as to plaintiffs' estoppel claims, summary judgment cannot be granted.

II. CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment and renewed motion to dismiss are DENIED.[9]

The Clerk of the Court is directed to send copies of this order to all counsel of record.

DATED this 22nd day of January, 2001.

/s/ ROBERT S. LASNIK
ROBERT S. LASNIK
United States District
Judge

[9] In connection with this motion, plaintiffs filed a motion to strike portions of defendants' reply. The three arguments and the one exhibit that plaintiffs allege were introduced in the reply were not factors considered in the Court's decision to deny summary judgment. Accordingly, plaintiffs' motion to strike is denied.

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C99-1597L

JOHN DOE AND JANE DOE, PLAINTIFFS

v.

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND THE UNITED STATES OF AMERICA, DEFENDANTS

June 7, 2000

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

LASNIK, District Judge.

Plaintiffs, former Cold War spies who were resettled in the United States with the assistance of the Central Intelligence Agency ("CIA"), have sued the CIA for ceasing to pay an allegedly agreed-upon financial stipend to plaintiffs and for the CIA's treatment of plaintiffs' administrative appeal of the CIA's denial of that stipend. Plaintiffs allege violations of their procedural and substantive due process rights under the

United States Constitution, and also seek declaratory, injunctive, and mandamus relief requiring the CIA to resume payments to plaintiffs.

This matter comes before the Court on defendants' Motion To Dismiss and plaintiffs' Motion For Preliminary Injunction. The Court has considered the briefs and supporting papers submitted by the parties, and heard oral argument on April 25, 2000. For the reasons discussed below, the Motion To Dismiss is granted in part and denied in part and the Motion For Preliminary Injunction is denied.

I. FACTUAL BACKGROUND[1]

Plaintiffs John and Jane Doe were formerly citizens of a foreign country that, at the time, was considered an adversary of the United States.[2] Plaintiffs were well educated professionals in their country of origin, and Mr. Doe was a high-ranking diplomat with that country's foreign service. For a period during the Cold War, Mr. Doe served in a senior diplomatic post in his country's embassy in another foreign country.

While working in that position, Mr. Doe and his wife approached a person they knew to be affiliated with the

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[1] For purposes of ruling on defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim, the Court assumes the truthfulness of plaintiffs' factual allegations. Accordingly, the facts described herein are those facts alleged by plaintiffs in the Second Amended Complaint and other pleadings. The Court did not assume these facts to be true in ruling on that part of defendants' motion to dismiss addressing the issue of jurisdiction. See discussion *infra*.

[2] The parties have excluded certain names and details in order to protect both the safety of plaintiffs and what the United States may consider to be national security information.

United States embassy and requested assistance in defecting to the United States. Plaintiffs allege that CIA agents then sequestered them in a CIA "safe house" for approximately twelve hours, attempting to coerce them and intimidate them into remaining at their diplomatic post and conducting espionage for the United States. The agents allegedly told plaintiffs they could not survive in the United States without the CIA's assistance, and that if they agreed to conduct espionage for a certain period of time, the CIA would arrange for plaintiffs' travel to and resettlement in the United States and would ensure financial and personal security for the remainder of plaintiffs' lives. The agents allegedly told plaintiffs that this program of assistance was approved at the highest levels of the United States government, and was in fact required to be provided under the laws of the United States.

Plaintiffs claim to have initially resisted the CIA agents' requests that they conduct espionage, protesting that they merely wished to defect. The agents, however, persisted. During the twelve hours they spent with the agents, plaintiffs claim the agents made several phone calls to CIA headquarters for instructions and approval of the offers being made to plaintiffs. Finally, in reliance on the CIA's alleged promise that plaintiffs eventually would be resettled in the United States, plaintiffs agreed to assist the United States by remaining at their diplomatic post and conducting espionage.

Plaintiffs allege they carried out their end of this bargain by conducting espionage on behalf of the United States for the specified time period. At the end of that period, agents allegedly pressured plaintiffs to engage in additional, more dangerous, activities. Plain-

tiffs, feeling they had no choice, complied with the new requests and assisted the CIA for an additional period of time.

Finally, the United States government arranged for plaintiffs to be brought to the United States. The plaintiffs spent approximately eight months in a safe house upon their arrival in the United States, where they were debriefed by various persons they understood to be CIA or other government officials. The United States provided plaintiffs with false identities and backgrounds, and offered to place plaintiffs in a semi-retired status with financial and health benefits. Plaintiffs requested that they instead be permitted to integrate into American society and become gainfully employed members of their new community. The CIA agreed, and promised that plaintiffs would be supported for the remainder of their lives to the extent their own earnings were insufficient. CIA agents explained that the CIA was required by law to provide plaintiffs with a "safety net" for the duration of their lives.[3]

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[3] Plaintiffs were told this was required as a result of their "PL-110" status, a term plaintiffs understood to refer to a United States statute or regulation governing persons in their situation. Defendants claim in their brief not to know what "PL-110" refers to, but believe it is a reference to 50 U.S.C. § 403h, which imposes no obligation of assistance on the government. Plaintiffs believe classified regulations implementing 50 U.S.C. § 403h may exist. It is clear that the term "PL-110" has been used by members of the intelligence community. The Court notes that plaintiffs' counsel saw a reference to testimony regarding "PL-110" in one of the CIA's decision documents they were permitted to review. Furthermore, testimony before Congress regarding defectors suggests that "PL-110" is a term used in the intelligence community. *See, e.g., Federal Government's Handling of Soviet and Communist Bloc*

During their first eight months in the United States, the CIA provided plaintiffs with education, medical benefits and a modest monetary living stipend. The educational benefits were intended to form the basis of plaintiffs' new false identities. Plaintiffs were subsequently resettled in the Seattle area, where they initially received a stipend of $20,000 per year in addition to housing, health care and other benefits. Over time, that stipend increased to $27,000. Beginning in 1987, Mr. Doe obtained professional employment with the assistance of the CIA, which provided Mr. Doe with a false resume and references. As his salary increased, the amount of the stipend provided by the CIA was decreased accordingly.[4] During the latter several years in which plaintiffs received a stipend, the total of the stipend and Mr. and Mrs. Doe's salaries equaled $27,000.

In 1989, Mr. Doe and the CIA agreed that if Mr. Doe's salary increased to $27,000, the CIA would cease paying him his stipend. Mr. Doe claims he specifically asked for assurances that if his employment were terminated, the CIA would resume paying the stipend. CIA officials allegedly assured Mr. Doe that payment of the stipend would be resumed in such circumstances, and assured Mr. Doe that the CIA would always "be there" for plaintiffs and that the CIA would help him find a new job if he were terminated.

Defectors: Hearings Before the Perm. Subcomm. On Investigations of the Senate Comm. On Gov. Affairs, 100th Cong. 102 (1987) (testimony of William W. Geimer, President, Jamestown Foundation); *see also, id.* at 191 (staff statement).

[4] Mrs. Doe also worked on a part-time basis; her earnings were apparently minimal.

In February 1997, the bank for which Mr. Doe worked was involved in a corporate merger. Mr. Doe's position was eliminated and he was laid off. While Mr. Doe made an effort to find new work, he had advanced in age by this time, his limited training was in a field in which corporate downsizing was occurring throughout the country, and he was restricted in his job search by the CIA's security arrangement, which required him to continue using the false background and false identity he had been given. Even though he was required to use the false resume and background the CIA had provided him, the CIA refused to assist him as it had in the past with finding a new job. Since that time, Mr. Doe has been unable to find a job.

Plaintiffs are now in serious financial straits. Both plaintiffs suffer from health problems, and have incurred substantial health care expenses. For a period of time, plaintiffs traveled to Eastern Europe to live with relatives in order to take advantage of more affordable health care and a lower cost of living. However, when Mr. Doe was recognized by an individual he knew to be a former member of his native country's security police, plaintiffs feared for their safety and returned to Seattle.

Plaintiffs now allege that if defendants do not resume payment of their monetary stipend, they may again be forced to return to Eastern Europe to live with relatives in order to survive financially. Plaintiffs fear that such a move will put them at great risk should they be recognized or found by agents of their native country's security police.

II. PROCEDURAL BACKGROUND

When Mr. Doe lost the job the CIA had helped him obtain, he and his wife contacted the CIA in the required manner. Plaintiffs wrote to their contact, providing the details of their situation and requesting assistance. Four months later, they received a letter from a CIA official. That letter stated that while the CIA "sympathize[d] with the situation" plaintiffs found themselves in, "due to budget constraints" the agency was unable to provide any additional assistance. The letter also stated that the CIA continued to be "concerned for [plaintiffs'] security and welfare and would hope to be flexible should [plaintiffs] require assistance in the future." Doe Decl. ¶ 15, Exh. 5.

Plaintiffs made further unsuccessful attempts to obtain assistance from the agency, and finally sought legal representation. The CIA granted plaintiffs' counsel security clearances for purposes of representing plaintiffs in their claim with the CIA. During an August 1997 meeting at which plaintiffs' attorneys were granted security clearance, an attorney from the CIA's general counsel's office explained that the CIA had retrospectively made a subjective assessment of the espionage activities performed by plaintiffs for the United States, and had determined that plaintiffs had already received "adequate" compensation for their services. When plaintiffs' counsel posed questions to the CIA attorney, she replied that she had no further information, and that she was simply a "messenger" with no knowledge of the substantive facts of plaintiffs' case. Plaintiffs' counsel asked to speak with someone with substantive knowledge or decision making authority, but were refused. Plaintiffs' counsel were told

plaintiffs could appeal the decision to the Director of Central Intelligence ("DCI").

Plaintiffs' counsel prepared an appeal to the DCI. In doing so, they requested a variety of documents from the CIA. For example, counsel requested copies of the regulations governing the appeal process and the rules and regulations applicable to resettled aliens such as plaintiffs. The CIA never responded to these requests.

Plaintiffs' counsel requested access to relevant records, persons with relevant knowledge of facts, and persons responsible for the appeal process. All of these requests were either denied or ignored by the CIA.

Notwithstanding their complete lack of substantive or procedural guidelines, plaintiffs' counsel filed their appeal with the DCI in December 1997. Counsel for the CIA advised plaintiffs' counsel orally that the Deputy Director of Operations (not the DCI) had denied the appeal, and advised plaintiffs' counsel that they could appeal to a panel chaired by former DCI Richard Helms ("the Helms Panel"). Plaintiffs' counsel again requested copies of relevant regulations or rules governing such an appeal, and requested written confirmation that their previous appeal had been denied. The CIA ignored both requests.

Plaintiffs appealed to the Helms Panel, again requesting information on the relevant rules and procedures, the opportunity to appear before the panel to present their case, and the opportunity to confront witnesses. These requests were all either denied or ignored.

Plaintiffs' counsel later were advised orally that based upon the recommendation of the Helms Panel,

the DCI had determined that the CIA should provide plaintiffs with benefits for a period of one year, contingent on plaintiffs' signing a waiver and release of claims. Plaintiffs' counsel were permitted to review the DCI's written decision in a secure location in Washinton, D.C., although the decision document did not bear any classification. Plaintiffs' counsel were not permitted to receive a copy of the document. The written decision did not state the reasons for rejecting plaintiffs' legal arguments and factual assertions, or what evidence had been relied upon in reaching the decision.

Plaintiffs' counsel also was allowed to review a document that appeared to be minutes of the Helms Panel's proceeding. That document indicated that three persons involved in the recruitment, handling, and resettlement of plaintiffs had testified. The brief summary of their testimony indicated that one witness testified that he or she had explained to plaintiffs that their "PL-110" status represented a life-long commitment for personal and financial security.

Plaintiffs' counsel sought clarification of whether the appeal process and the DCI's decision represented a final adjudication of plaintiffs' rights, and if so, how such an adjudication could be premised on a demand for a waiver and release. The CIA did not respond to plaintiffs' counsel's inquiry.

This action ensued following plaintiffs' counsel's inability to obtain clarification or information from the CIA regarding the nature and scope of the agency's decision with respect to plaintiffs' appeal, or the legal, evidentiary, regulatory, or statutory basis for that decision. In their Second Amended Complaint, plaintiffs have stated claims for violation of their due process

rights under the United States Constitution, and for declaratory, injunctive, and mandamus relief requiring the CIA to resume payment of the monetary stipend at issue.

III. DISCUSSION

Defendants have moved, pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), to dismiss the Second Amended Complaint.[5] First, defendants argue that this Court lacks subject matter jurisdiction over plaintiffs' claims. Second, defendants argue that the Amended Complaint fails to state claims upon which relief may be granted.

A. *Motion To Dismiss For Lack Of Subject Matter Jurisdiction*

In moving for dismissal on the basis of jurisdiction, defendants make three arguments. First, defendants argue that this Court is precluded under the Supreme Court's decision in *Totten* v. *United States*, 92 U.S. 105, 2 Otto 105, 23 L. Ed. 605 (1875) from enforcing "secret agreements." Second, defendants argue that litigation of plaintiffs' claim would involve issues "that are, and must, remain as secret as the existence and substance of any secret agreements themselves." Defs,' Opp. at 5. Third, defendants argue that this Court lacks jurisdiction as a result of the Tucker Act, 28 U.S.C. ¶ 1491(a)(1), which provides that only the United States Court of Claims may exercise jurisdiction over contract claims against the government seeking more than $10,000.

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[5] The parties stipulated to allow filing of a Second Amended Complaint, in which plaintiffs do not assert, but reserve the right to assert, a contract claim against defendants.

First, the Court disagrees with defendants' characterization of this case throughout its pleadings as a "dispute over an alleged contract for secret services." Defs.' Opp. at 5. The plaintiffs have alleged, in relevant part, that defendants' actions violated plaintiffs' due process rights. The Court need not consider whether plaintiffs actually had an enforceable contract with defendants entitling them to the benefits they seek. Nor must the Court, as defendants suggest, make any "explicit or implicit acknowledgment" that such a contract exists.

Regardless of whether a secret contract does exist, there are substantial issues and claims remaining in this case that lie outside the reach of *Totten*. In particular, as described more fully below, plaintiffs have alleged conduct on the part of defendants that, if true, would constitute a violation of plaintiffs' substantive due process rights. In addition, regardless of whether plaintiffs had a contractual entitlement to benefits (which *Totten* might foreclose the Court from recognizing) or a right to benefits arising out of promissory estoppel, equitable estoppel, or a statutory or regulatory right, once the defendants represented to plaintiffs that a process existed through which they could "appeal" the denial of their monetary stipend, defendants assumed an obligation to provide procedural due process to plaintiffs. The allegations here plainly state such constitutional claims, which are not automatically shielded from this Court's review by *Totten*.[6]

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[6] Accordingly, *Guong* v. *United States*, 860 F.2d 1063 (Fed. Cir. 1988), which defendants rely upon, is not directly on point. Unlike the plaintiffs in this case, Guong had no constitutional claims; rather, he sued to recover for breach of an alleged employment

In fact, the Supreme Court has held that the denial of "any judicial forum for a colorable constitutional claim" would raise "serious constitutional questions." *Webster* v. *Doe*, 486 U.S. 592, 603-05, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988) (quoting *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 681, n.12, 106 S. Ct. 2133, 90 L. Ed. 2d 623 (1986)). While the Court was referring to the government's argument that section 102(c) of the National Security Act precluded judicial review of a constitutional claim against the CIA, the Court also noted that "[e]ven without such prohibitory legislation from Congress, . . . traditional equitable principles requiring the balancing of public and private interests control the grant of declaratory and injunctive relief in the federal courts." *Webster*, 486 U.S. at 604-05, 108 S. Ct. 2047. Here, those "traditional equitable principles" require this Court to exercise jurisdiction over plaintiffs' constitutional claims where those claims raise factual questions outside the scope of a *Totten*-type contract dispute.

Second, litigation of plaintiffs' claims will not require public revelation of the defendants' intelligence gathering methods. As the Supreme Court observed in *Webster*, "the District Court has the latitude to control any discovery process which may be instituted so as to balance [plaintiffs'] need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality

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contract with the CIA—a purely contractual claim. In holding that Guong's claim was an unenforceable contract for "secret services" under *Totten*, the Federal Circuit did not address the issue of whether *Totten* would foreclose the courts' consideration of constitutional claims such as those at issue here.

and the protection of its methods, sources, and mission." *Id.* at 604, 108 S. Ct. 2047.

Certainly that portion of plaintiffs' case that is premised on the CIA's procedures for reviewing complaints and appeals does not represent a national security secret. Moreover, with respect to the facts of plaintiffs' case, Defendants have reviewed and approved for public filing all papers filed by plaintiffs thus far. If the CIA does not object to public airing of the allegations already filed in this case, the Court is confident that the case may be litigated without requiring the disclosure of national security secrets. If not, defendants may request leave to submit materials in this matter under seal or *in camera*, or may assert the state secrets privilege recognized in *United States* v. *Reynolds*, 345 U.S. 1, 7-8, 73 S. Ct. 528, 97 L. Ed. 727 (1953).

Finally, defendants' argument that the Tucker Act requires that this case be heard by the United States Court of Claims fails for the same reason its *Totten* argument fails. Plaintiffs are not seeking a money judgment from defendants based on a contract. Plaintiffs are seeking to have this Court determine whether their due process rights were violated, and to have this Court enter an injunctive remedy which could, as a consequence, require defendants to reconsider plaintiffs' request to have their payments resumed. This does not make this case a contract dispute that must be submitted to the United States Court of Claims.

Accordingly, the Court finds that it has subject matter jurisdiction over plaintiffs' due process claims.

B. *Motion To Dismiss For Failure To State A Claim*

Defendant also has moved to dismiss plaintiffs' action pursuant to Rule 12(b)(6) for failing to state claims upon which relief can be granted. The Court will only grant such a motion where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *see* also, *Terracom* v. *Valley Nat'l Bank*, 49 F.3d 555, 558 (9th Cir. 1995). In considering such a motion, the Court assumes the allegations of fact contained in the complaint to be true and construes them in the light most favorable to the non-moving party. *Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990).

1. Due Process Claims

Plaintiffs' due process claim appears to the Court to be, in fact, two claims. In alleging that defendants' actions deprived plaintiffs of constitutionally protected property and liberty interests, plaintiffs have stated both substantive and procedural due process claims. Accordingly, the Court must examine whether plaintiffs have alleged a violation of procedural due process, which depends on whether the government has followed proper procedures in depriving plaintiffs of property or liberty interests, and substantive due process, which depends on whether the government's deprivation of plaintiffs' fundamental interests is permissible regardless of the fairness of the procedures used.

a. *Procedural Due Process*

The doctrine of procedural due process requires that the government give a person certain procedural rights before depriving that person of a constitutionally protected property or liberty interest. *See, e.g., Santosky* v. *Kramer*, 455 U.S. 745, 758-59, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). It is beyond dispute that under the facts as alleged in this case, plaintiffs were afforded very little process. Indeed, the CIA declined even to respond to requests for the relevant rules or regulations governing the agency's appeal process. The only question the Court must decide in determining whether plaintiffs have stated a procedural due process claim is whether plaintiffs were deprived of a constitutionally protected property or liberty interest.

Defendants argue that plaintiffs cannot show that they were deprived of a protected property interest, because "[t]o have a property interest in a benefit, a person must have a legitimate claim of entitlement to it." Def.s' Opp. at 7 (citing *Board of Regents* v. *Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). Defendants argue that an entitlement, which may be created by rules, statutes, regulations, ordinances, or express or implied contracts, does not exist in this case because the contract upon which plaintiffs base their entitlement is a secret agreement, which the Court is precluded from even acknowledging the existence of under *Totten*.

The Court disagrees. Plaintiffs may be able to base their entitlement to receipt of the CIA's monetary stipend on theories other than contract. For example, if plaintiffs are able to prove that they had an entitlement to benefits based on a promissory or equitable estoppel

theory, or if there is a regulatory or statutory basis for their entitlement,[7] then they may be able to show a constitutionally protected property interest, regardless of *Totten*.

In addition to a possible property interest in the benefits they received up until 1997, plaintiffs have alleged a deprivation of their most fundamental liberty interests, including their ability to provide for their basic needs and their personal safety. After plaintiffs assisted defendants by conducting espionage activities, plaintiffs were required to assume new identities in order to resettle in the United States and to protect their safety. This required sacrificing their past professional training, personal relationships, names, and personal histories. With the defendants' assistance, plaintiffs were obliged to establish false identities in order to "engage in the common occupations of life." *Meyer* v. *Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923).

Now that defendants have ceased payment of a monetary stipend to plaintiffs, and allegedly have refused to assist Mr. Doe in finding new employment, plaintiffs' abilities to engage in the "common occupations of life," which are "essential to the orderly pursuit of happiness by free men," are substantially hindered. *Id.* As the Court recognized in *Meyer*, these activities

[7] The Court notes, for example, that defendants have not disclosed any relevant regulations to plaintiffs or the Court, and that there appears to be some dispute as to whether a regulatory or statutory scheme referred to as "PL-110" entitles plaintiffs to lifelong benefits. *See* discussion *supra* at note 3. Without full briefing and consideration of these issues, the Court is not prepared to find that plaintiffs have no regulatory or statutory basis for their entitlement.

and occupations are encompassed by the Constitution's liberty protection. *Id.*

Furthermore, now that plaintiffs' economic situation may require them to move abroad in order to find a way to support themselves financially, their personal safety is put at risk as well. Plaintiffs believe the espionage activities they performed are well-known to their former government, and that if they return to Eastern Europe, they may be recognized and retaliated against by agents of their former government. This directly implicates plaintiffs' fundamental liberty interests. *See Kallstrom* v. *City of Columbus*, 136 F.3d 1055, 1062 (6th Cir. 1998) (individuals' "interest in preserving their lives . . ., as well as preserving their personal security and bodily integrity" constitutes a "fundamental liberty interest").

Assuming, as the Court must at this stage, that the facts alleged by plaintiffs are true, the Court finds that plaintiffs have alleged facts sufficient to state a claim that their right to procedural due process has been violated.

b. *Substantive Due Process*

Plaintiffs also have alleged conduct supporting a claim that the CIA's conduct has violated their substantive due process rights. Substantive due process violations occur when the state impermissibly deprives an individual of an interest so fundamental, deprivation is prohibited "regardless of the fairness of the procedures used . . ." *Wood* v. *Ostrander*, 879 F.2d 583, 589 (9th Cir. 1989) (*quoting Daniels* v. *Williams*, 474 U.S. 327, 330-32, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)). As it applies here, the Due Process Clause prevents the government from affirmatively placing an individual in

danger, and requires the government to provide for and protect a person with whom it creates a special relationship. *Wang* v. *Reno*, 81 F.3d 808, 818 (9th Cir. 1996).[8]

In *DeShaney* v. *Winnebago County Department of Social Services*, 489 U.S. 189, 199-200, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989), the Supreme Court held that when the government creates a special relationship with a person, the substantive component of the Due Process Clause obligates the government to provide for that person's basic needs and to protect him from deprivations of liberty. *Id.*; *see also*, *Wang*, 81 F.3d at 818; *L.W.* v. *Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992).[9] Similar cases have held that the government may not affirmatively place an individual in danger. *See, e.g.*, *Wood v. Ostrander*, 879 F.2d at 589-90; *Ketchum v. County of Alameda*, 811 F.2d 1243, 1247 (9th Cir. 1987).

Here, the complaint alleges both that the government created a special relationship with the plaintiffs and that it has affirmatively put them in danger. Plaintiffs allege that the government created a special relationship with plaintiffs by relying on them to conduct espionage, bringing them to this country and resettling them under false identities, aiding them in

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[8] The analysis of these two protections has been blended together in some cases, and they have been described as exceptions to the general rule that "members of the public have no constitutional right to sue state employees who fail to protect them from harm inflicted by third parties." *L.W.* v. *Grubbs*, 974 F.2d at 121.

[9] While many "special relationship" cases have involved individuals being held in custody, such custody is not required to find that a special relationship has been created. *See, e.g.*, *Wang*, 81 F.3d at 818 (involving government's prosecution witness).

obtaining employment through the use of false backgrounds, and paying them a monetary stipend over the course of the years. Furthermore, plaintiffs allege that the government has failed to provide them with the ability to sustain their most basic needs since it ceased paying their monetary stipend.

Plaintiffs also allege that the government has affirmatively put them in danger. Not only is the government alleged to have placed plaintiffs in danger by asking them to engage in dangerous espionage activities, the government's cessation of plaintiffs' monetary stipend allegedly leaves them with no means of sustaining their basic needs, forcing them to travel to Eastern Europe in search of economic security, where their personal safety would be in danger.

The Court finds that plaintiffs have sufficiently stated a claim that the government violated their substantive due process rights by creating a special relationship with plaintiffs and then failing to provide for their basic needs and protect them from deprivations of liberty, or by affirmatively placing them in danger. Accordingly, the Court will deny the motion to dismiss as to that claim.

2. Equal Protection Claim

Plaintiffs also claim that defendants have violated their right to equal protection by treating them differently from those corporations or persons with whom the government has ongoing relationships or contracts, on the basis that their contract was to provide "secret services." Plaintiffs allege that by invoking the *Totten* doctrine, the government subjects defectors and others who secretly contract with the government to unequal treatment in violation of the Fifth Amendment.

The Court finds that, as to this claim, plaintiffs have failed to state a claim upon which relief can be granted. Equal Protection requires that "all persons similarly circumstanced shall be treated alike." *Plyler* v. *Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982). Thus, plaintiffs must allege "unequal treatment of people similarly situated." *Gilbrook* v. *City of Westminster*, 177 F.3d 839, 871 (9th Cir. 1999).

It is clear that ordinary government contractors and "secret" government contractors are not "similarly situated." The government undoubtedly has a valid interest in making secret contracts that must be treated differently from ordinary government contracts. Furthermore, as defendants have noted in their Motion To Dismiss, plaintiffs have not alleged that the CIA's treatment of their claim to a monetary stipend was unequal to treatment of claims submitted by others. Therefore, the Court finds that plaintiffs have not alleged facts that, if proven, would support their claim under the Equal Protection clause of the Fifth Amendment. That claim will, therefore, be dismissed.

3. Injunctive, Declaratory Judgment, and Mandamus Claims

Defendants have not argued that plaintiffs' claims for injunctive, declaratory, and mandamus relief should be dismissed, except insofar as they argue that these claims are merely cleverly worded contract-based claims precluded from judicial enforcement by *Totten*. As set forth above, there is more at stake in this case than contract rights. Accordingly, the Court finds that plaintiffs have stated claims for an injunction, a declaratory judgment, and mandamus that are sufficient to withstand this Motion To Dismiss.

C. *Motion For Preliminary Injunction*

Plaintiffs have filed a motion for preliminary injunction, seeking to enjoin defendants from denying payment of the monetary stipend to plaintiffs. Where a party seeks an injunction compelling another party to commence performance of some mandatory act, as opposed to prohibiting some conduct, courts are required to be "extremely cautious," as such mandatory injunctions are "particularly disfavored." *Stanley* v. *University of Southern California*, 13 F.3d 1313, 1319-20 (9th Cir. 1994). In the case of a motion for a mandatory injunction, Ninth Circuit law provides that district courts should "deny such relief unless the facts and law clearly favor the moving party." *Id.* at 1320.

Plaintiffs argue that they do not seek a mandatory injunction, but rather seek to preserve the status quo, defining the status quo as the period prior to defendants' wrongful cessation of payments to plaintiffs. However, the motion does not seek to prohibit conduct by defendants; rather, it seeks to require defendants to perform an affirmative act they are not currently performing. Therefore, the Court finds that plaintiffs do seek a mandatory injunction, which is subject to the heightened standard discussed above. Under that standard, the Court is not satisfied that the facts and law "clearly favor" the plaintiffs and the motion for preliminary injunction will be denied.

IV. CONCLUSION

For the reasons stated, the Court finds that it has subject matter jurisdiction over the claims contained in plaintiffs' Amended Complaint and that plaintiffs have stated claims for violation of their substantive and procedural due process rights, and for injunctive, declara-

tory, and mandamus relief. The Court also finds that plaintiffs have failed to state a claim for violation of their equal protection rights, and have failed to establish entitlement to a preliminary injunction.

ACCORDINGLY, it is hereby ORDERED that defendants' Motion To Dismiss is GRANTED with respect to plaintiffs' equal protection claim, but DENIED in all other respects. The Motion For Preliminary Injunction is DENIED.

The Clerk of the Court is directed to send copies of this order to all counsel of record.

APPENDIX H

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C99-1597L

JOHN DOE AND JANE DOE, HUSBAND AND WIFE,
PLAINTIFFS

v.

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND THE UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Mar. 31, 2000]

SECOND AMENDED COMPLAINT

I. PARTIES

1.1 Plaintiffs.

Plaintiffs, whose true names are not disclosed for reasons of personal security, are proceeding herein by use of pseudonyms, John Doe and Jane Doe. Plaintiffs are husband and wife, are citizens of the United States, and reside in King County, Washington.

1.2 Defendant Director of Central Intelligence.

George Tenet, Director of Central Intelligence and Director of the Central Intelligence Agency ("DCI"), is sued in his official and personal capacities. As DCI, he is charged with exercising the powers and duties of the Central Intelligence Agency in accordance with duly adopted procedures and the laws and Constitution of the United States. As an individual, he is charged with performing his duties under the laws and Constitution of the United States.

1.3 Defendant U.S.A.

The United States of America is responsible, through its agents, including the DCI, for depriving plaintiffs—without due process of law—of assistance and benefits to which they are entitled, and violating plaintiffs' constitutionally protected rights.

II. JURISDICTION AND VENUE

2.1 Subject Matter Jurisdiction.

Jurisdiction is invoked under 28 U.S.C. §§ 1331, 1361 and 2201. Plaintiffs' claims for relief arise under the Fifth Amendment to the United States Constitution.

2.2 Personal Jurisdiction.

This Court has personal jurisdiction over all defendants.

2.3. Venue.

Venue is proper under 28 U.S C. § 1391(e).

III. INTRODUCTION

3.1 Summary.

This is a civil action for declaratory judgment, injunctive relief, and relief in the nature of mandamus.

Plaintiffs seek to require the United States and its agents, as well as the DCI in his personal capacity, to provide a constitutionally adequate and nondiscriminatory process for determining plaintiffs' rights under relevant contracts, statutes and regulations, or agency-fostered expectations, and to cease depriving plaintiffs of their substantive due process rights to liberty.

3.2 The Central Intelligence Agency's Mistreatment of Defectors.

The Central Intelligence Agency (or "CIA" or "Agency") has had a troubling relationship with defectors. While such persons have been and continue to be of vital importance to the Agency and its mission, the Agency frequently mistreats defectors after extracting their useful information and service. During the 1980s, a comprehensive investigation by the Agency's own Inspector General concluded that the Agency's actions and procedures with regard to defectors were grossly unfair and inappropriate. Although certain "reforms" (including creation of a panel responsible for hearing appeals of Agency decisions with regard to defectors) were apparently promised after this report was presented to Congress, the present case illustrates that these "reforms" remain unfulfilled. The Agency continues to exercise its vast and largely unchecked powers to avoid its lawful obligations to defectors, including hiding behind its cloak of secrecy to avoid fair procedures.

3.3 The Misuse of the DCI's Statutory Obligation to Protect Intelligence Sources and Methods.

Recognizing the frequent need for secrecy in the conduct of foreign intelligence, Congress in the legislation establishing the CIA bestowed on the DCI both the power and the obligation to "protect intelligence

sources and methods." Too often, the DCI and other Agency officials misuse this power to avoid lawful obligations and effective checks and balances through Congressional oversight and judicial scrutiny. The power to protect intelligence sources and methods may not and need not be employed to avoid meaningful due process for those seeking fair treatment regarding rights and interests created by the Agency and by Congress or to deprive defectors such as plaintiffs of their rights to substantive due process. Equal protection further demands that those whose property or lives are subject to Agency action be accorded due process like other citizens.

3.4 Misuse of the Totten Doctrine.

The CIA regularly makes promises to and agreements with defectors and others who rely on such promises and agreements as the solemn obligations of the United States. The Agency, however, often does not respect such agreements, ignoring its obligations whenever it chooses to do so. To facilitate this wrongful conduct, the Agency utilizes the so-called Totten Doctrine (*Totten* v. *United States*, 92 U.S. (2 Otto) 105, 23 L. Ed 605, 11 Ct. Cl. 182 (1875)) to block judicial enforcement of its lawful obligations. In many instances, including this one, the application of the Totten Doctrine is inappropriate and not necessary to protect national security and intelligence sources and methods. The availability of the Totten Doctrine, however, causes the Agency to believe not just that it is beyond judicial scrutiny, but that it need provide only those internal procedures that suit its purposes. In the instant case, the Agency cited the Totten Doctrine in response to plaintiffs' complaints of unfair treatment and then ignored plaintiffs' complaints and conducted

internal proceedings that were devoid of fairness and constituted an arbitrary and capricious exercise of unchecked power. The existence of the Totten Doctrine makes full and fair administrative procedures within the Agency all the more essential. If a citizen whose liberty or property is subject to Agency actions has no judicial recourse and must avail himself or herself of administrative procedures conducted in secret, then those procedures must be as rigorously fair as possible.

3.5 Reservation of Rights Regarding Contract Claim.

Plaintiffs have sought and continue to seek to work within the Agency's special needs for confidentiality. Barring success in their attempt to enforce fair internal Agency procedures, however, plaintiffs reserve the right to bring contract claims and challenge the Totten Doctrine at a later time in the Federal Court of Claims, which has exclusive jurisdiction over the contract claims.

IV. PLAINTIFFS' BACKGROUND AND RELATIONSHIP WITH THE AGENCY

4.1 Plaintiffs were formerly citizens of a foreign nation then considered to be an enemy of the United States, and John Doe was a high-ranking diplomat for such foreign nation.

4.2 For a period during the Cold War, plaintiffs were residing in a second foreign nation on diplomatic assignment for the first nation. Plaintiffs resided in the embassy compound and were subject to constant surveillance by the first nation's security service.

4.3 During this time and at great risk, plaintiffs approached a person known to them to be attached to

the United States embassy and requested assistance in defecting to the United States.

4.4 Rather than providing the requested assistance, CIA agents sequestered the plaintiffs in an Agency safe house. The agents employed various forms of intimidation and coercion to convince plaintiffs that they could not survive in the United States without Agency assistance. The agents asserted that, to obtain such assistance, plaintiffs would be required to remain at their current diplomatic post and conduct espionage for the United States for a specified period of time, after which the Agency would arrange for travel to the United States and ensure financial and personal security for life. The agents assured plaintiffs that the assistance being offered was approved at the highest level in Washington and was, in fact, required by the laws of the United States.

4.5 Plaintiffs resisted the requests of the agents, stressing that all they sought was assistance in defecting. The agents persisted, using tactics that induced great fear and uncertainty in plaintiffs.

4.6 During this time, a CIA agent said to be the Chief of Station made several calls to CIA headquarters to receive instructions and approval of the offers being made to plaintiffs. On information and belief, due to the importance of plaintiffs' prospective espionage activities, this "recruitment" would have been personally directed and the inducements made to plaintiffs personally approved by the CIA's Deputy Director of Operations at Langley, Virginia with the knowledge and concurrence of the DCI.

4.7 After being sequestered in an Agency safe house for nearly 12 hours, plaintiffs reluctantly agreed to work "in place" for the United States.

4.8 After carrying out their end of the bargain at great personal risk for the requisite time period, plaintiffs requested that the Agency arrange for their defection and travel to the United States.

4.9 Instead of making immediate arrangements for defection, the Agency pressured plaintiffs to undertake more and different types of espionage activities that would expose plaintiffs to far greater danger and virtually guaranteed that the nature and extent of these activities would become known to the first nation, putting them at life-long risk of retaliation, including the risk of assassination.

4.10 Believing they had no other choice, plaintiffs compiled with these new requests.

4.11 After performing the additional highly dangerous and valuable assignments, plaintiffs were eventually brought to the United States and provided with new names and false backgrounds.

4.12 The Agency designated plaintiffs as having "PL-110" status. The Agency is obligated to provide life-long assistance to all defectors who are brought into the United States under what is referred to as "PL-110 status." On numerous occasions over the years, various Agency representatives told plaintiffs that they had "PL-110 status" and repeatedly assured plaintiffs, both initially as an inducement to conduct espionage and later, that the Agency was required by law to provide plaintiffs with financial and other assistance during their lifetime and to ensure their personal security. In addition to defendants' own admissions in the course of

their relationship with plaintiffs, Lt. General Williams, former Director of the Defense Intelligence Agency, provided congressional testimony that PL-110 status requires life-long support for participants.

4.13 Shortly after arriving in the United States. Agency officials presented plaintiffs with a document ("Document One") to sign, indicating that execution of the document was "required" in order to proceed with resettlement and provision of benefits, but that the document was a mere "formality" and did not change the Agency's commitment or obligation to provide life-long financial assistance and personal security for plaintiffs. In reliance on the Agency officials' representations, and believing they had no other choice, plaintiffs executed the document.

4.14 As soon as permitted by law, plaintiffs became citizens of the United States.

4.15 Using a false name and false resume, and with the Agency's assistance and guidance, John Doe eventually obtained professional employment.

4.16 As John Doe's salary increased over time, the Agency living stipend decreased and eventually was discontinued. During this time, the Agency presented plaintiffs with a second document ("Document Two") setting out the eventual termination of certain financial benefits. The Agency indicated that plaintiffs were required to execute the document. While John Doe was gainfully employed at the time, plaintiffs were concerned about what would happen if John Doe lost his job. In response to this specific question, the Agency official replied with the same assurances other Agency officials had given plaintiffs—namely, that, notwithstanding either Document One or Two, the Agency

would always "be there" for plaintiffs and would renew financial and other assistance if John Doe lost his job. In reliance on these representations, and believing they had no assistance other choice, plaintiffs executed Document Two.

4.17 Document Two expressly reconfirms the Agency's continuing obligation to provide for plaintiffs' security.

4.18 After a number of years of successfully supporting himself and his spouse without Agency assistance, John Doe in early 1997 was laid off from his job due to elimination of his position following a corporate merger.

4.19 John Doe's efforts to find new employment were limited by his security arrangements with the Agency to a certain segment of the employment marketplace, and this segment was in general contraction nationwide. In addition, the Agency's security arrangements required John Doe to continue utilizing the false name and background created by the Agency and the Agency, did not assist, as it had in the past, by talking with senior management of the prospective employer to disclose plaintiffs' true circumstances in order to facilitate employment opportunities. To date, John Doe's extensive efforts to find new employment have been unsuccessful.

4.20 As set forth in Section V below, plaintiffs for more than two years attempted in good faith to work within the confines of the Agency to resolve their situation. In the meantime, plaintiffs' health and financial circumstances have deteriorated and are cause for grave concern. Plaintiffs are forced to subsist on their limited retirement savings and what few earnings they

have managed to obtain. Yet, given their increasing ages and health concerns, plaintiffs will be unable to replenish those resources even if the Agency assists in locating suitable employment immediately. If the Agency does not provide, at a minimum, the health and retirement safety net needed, plaintiffs soon will be destitute.

4.21 In spite of bleak prospects, John Doe continues to search for suitable employment. In an effort to further reduce their cost of living after his unemployment benefits ran out, after defendants wrongfully failed to renew assistance after John Doe's layoff, plaintiffs temporarily left the United States to live with one of their aging relatives in a former Eastern Bloc country in near subsistence level conditions. This was an act of desperation, as it greatly increased the risk to plaintiffs' personal security.

4.22 Defendants created the ongoing serious risk to plaintiffs' personal security by coercing plaintiffs to conduct intelligence activities that clearly fingerprinted them as having conducted espionage for the United States. As a result, the security service of their former country imposed a sanction on them that calls for either death or life imprisonment for John Doe and substantial time for Jane Doe. Plaintiffs are aware that sanctions by the aforementioned security service for some persons have been lifted following the end of the Cold War. Sanctions have not been lifted, however, for persons like plaintiffs who formerly occupied senior positions within the government and who were known to have conducted espionage activities. The continued presence of such sanctions presents a continuing danger to plaintiffs and causes them considerable concern and anxiety.

4.23 While temporarily living with a relative in an Eastern Bloc country following defendants' failure to renew assistance, John Doe obtained employment as an advisor to the president of a commercial company on matters related to international trade. The position provided a minimal salary, but also some prospect for improvement. After serving in this position for several months, John Doe came in direct contact with a former associate known to him to be, at least in the past, an officer of the state security service. In order to eliminate further contact with this individual and the associated threat to plaintiffs' personal security, John Doe immediately terminated his employment with the company.

4.24 At this same time, plaintiffs were experiencing health problems. The local medical facilities were hopelessly inadequate and were unable to treat plaintiffs' medical problems. The combination of the extreme concern and risk occasioned by the recognition of the former (or perhaps current) security service agent, the need to obtain competent medical treatment caused plaintiffs to return to the United States.

4.25 Since returning to the United States, plaintiffs have obtained temporary work for approximately three months. Aside from this income, plaintiffs have been living by borrowing against their limited retirement savings. John Doe still cannot find regular, professional work and Jane Doe is unable to do any physical work due to her medical condition. Plaintiffs' modest assets will soon be depleted if defendants are not compelled to resume assistance, and plaintiffs believe they will soon have no other choice than to leave the United States and go once again to an Eastern Bloc country in order to reduce their living expenses and to search for em-

ployment where they believe there is more opportunity under their unique circumstances. Plaintiffs have great concern and anxiety over such a move because it will greatly increase their odds of coming in contact with current or former security service agents who are aware of the sanctions against them.

V. THE AGENCY'S DEROGATION OF ITS CONSTITUTIONAL AND STATUTORY OBLIGATIONS

5.1 In February 1997, in accordance with the procedure prescribed by the Agency for making contact, plaintiffs wrote their Agency contact providing the details of their situation and asking for assistance.

5.2 Plaintiffs received no response from the Agency for nearly four months. When a response did come in June 1997, the Agency expressed regret that no funds were available to provide assistance. No other reason was given for not assisting plaintiffs as they requested. The Agency's letter stated in part:

> We are very sorry that it has taken this long to respond to your telephone calls and letter, but we have been in a state of transition and have been unable to give your problem our fullest attention until recently. We were very sorry to learn that you were laid off from your position. . . . Please be assured that we have carefully reviewed the information you submitted along with your contract with this organization and the benefits contained therein. . . . , we sympathize with the situation you now find yourself in but regret that due to our budget constraints, we are unable to provide you with additional assistance.

* * *

> We want you to know that this office has great respect for the people we serve and we remain grateful for your past service to this country.
>
> We continue to be concerned for your security and welfare and would hope to be flexible should you require assistance in the future.

5.3 When plaintiffs' further attempts at obtaining Agency assistance failed to produce any results, plaintiffs sought legal representation.

5.4 The Agency subsequently granted the undersigned counsel for plaintiffs security clearances for purposes of representing plaintiffs in their claim with the Agency.

5.5 During a meeting at which the security clearances were granted to the undersigned counsel, the Agency representative (an attorney from the office of General Counsel) purported to explain the Agency's unilateral determination that the benefits previously provided were adequate for the services rendered and that plaintiffs were entitled to no further benefits. The Agency's attorney did not at this time claim any budgetary problems. The Agency representative also showed the undersigned five documents, including two versions of Document One (one in English and one in plaintiffs' native language) and Document Two, claiming that these documents extinguished any rights plaintiffs may have had.

5.6 During this meeting, the Agency's attorney made false and misleading statements concerning plaintiffs' services and impugning plaintiffs' character. Plaintiffs' counsel responded to the extent they could based on the limited information available to them. The Agency's representative was unable to reply because,

as she said, she "was just a messenger" and had no substantive knowledge of the facts. Plaintiffs' counsel therefore requested an opportunity to meet with Agency persons who were (a) substantively knowledgeable and (b) empowered to make decisions. This request was denied. Instead, the Agency advised that plaintiffs could appeal the decision to the DCI.

5.7 Plaintiffs prepared an appeal to the DCI. In doing so, the following occurred.

(a) Plaintiffs' counsel repeatedly requested from the Agency copies of the regulations that governed the appeal process. These requests were ignored.

(b) Notwithstanding the obvious relevance of the PL-110 rules and regulations to plaintiffs' claim, the Agency has consistently denied or ignored plaintiffs' counsel's requests for copies of such rules and regulations.

(c) Plaintiffs' counsel repeatedly requested access to records classified within the level of security clearances granted plaintiffs' counsel. These requests were denied or ignored.

(d) Plaintiffs' counsel repeatedly requested access to the persons with personal knowledge of the relevant facts. These requests were denied or ignored.

(e) Plaintiffs' counsel requested face-to-face meetings with responsible Agency officials, with or without plaintiffs present, to discuss the relevant facts and circumstances. These requests were denied or ignored.

(f) Notwithstanding the considerable obstacles presented by the Agency's aforestated failures to provide even the most basic information, plaintiffs filed their appeal with the DCI on or about December 9, 1997. At the same time, plaintiffs requested an independent review by the Agency's Inspector General ("IG"). This request and follow-up requests for IG review have not, to plaintiffs' knowledge, resulted in any review by the IG.

(g) Subsequently, counsel for the Agency orally advised counsel for plaintiffs that the Deputy Director of Operations (not the DCI) had denied their appeal. Counsel for the Agency advised that a further appeal was possible to a panel of former Agency officials (referred to as the Helms Panel after its chairperson, former DCI Richard Helms). Being confused about the appeal process as a result of the inconsistent and contradictory oral information provided by the Agency, plaintiffs again requested copies of the regulations or rules governing such appeals. This request, like all before it, was ignored.

(h) Plaintiffs' counsel requested written confirmation of the Agency's determination of the appeal. This request was ignored.

(i) Plaintiffs pursued an appeal to the Helms Panel and, in doing so, renewed their requests for access to documents and persons and for a copy of regulations governing the appeal process. In addition, plaintiffs' counsel made repeated requests for an opportunity for plaintiffs themselves or, at a minimum, for counsel for plaintiffs to appear before the Helms Panel and present their case. Plaintiffs' counsel also made repeated requests for an oppor-

tunity to confront witnesses—whose identities could, if necessary, be concealed. These requests were directed both to the Agency and to the Helms Panel. All such requests were either denied or ignored.

(j) Counsel for the Agency subsequently advised plaintiffs' counsel orally that the DCI had determined, based on the recommendation of the Helms Panel, that the Agency should provide certain benefits to plaintiffs for a period not to exceed one year, and nothing thereafter.

(k) Plaintiffs' counsel was allowed to read the DCI's written decision at a secure location in the Washington D.C. area. Even though the DCI's decision document did not bear any classification, the Agency refused to provide plaintiffs or plaintiffs' counsel with a copy of the document.

(l) Counsel for the Agency subsequently advised that in order for plaintiffs to accept the benefits of the DCI's decision, they would have to execute full and complete waivers and releases. The DCI's decision document itself makes no mention of waivers or releases.

(m) Plaintiffs' counsel subsequently wrote counsel for the Agency asking for clarification of whether the appeal process and the DCI's decision represented an adjudication of plaintiffs' rights, and if so, how such an adjudication could be predicated on a demand for a waiver and release. The Agency has not responded.

5.8 On information and belief, the documents the Agency elected to show plaintiffs' counsel were only those documents that the Agency believed were

exculpatory as to its conduct. Inculpatory documents were not shown to plaintiffs' counsel. The decision regarding what to show and not show plaintiffs' counsel was self-serving, and not based on any legitimate concern for protecting intelligence sources and methods.

5.9 The Agency's response to an inquiry from the United States Senate regarding plaintiffs' claims was contained in the third document shown to the undersigned counsel ("Document Three"). Document Three was misleading and omitted material facts important to fair consideration of plaintiffs' request for assistance.

5.10 On information and belief, the factual information provided by Agency staff to the Deputy Director of Operations and the DCI as part of the official review of plaintiffs' appeals was misleading and omitted material facts important to plaintiffs' petition for assistance.

5.11 On information and belief, the factual information provided by the Agency to the Helms Panel was misleading and omitted material facts important to plaintiffs' appeal.

5.12 On information and belief, substantial documentation relevant to plaintiffs' appeal is available that is unclassified or classified within the security clearance level granted to plaintiffs' counsel. This information was not disclosed to plaintiffs' counsel and, on information and belief, not presented to the Helms Panel.

5.13 On information and belief, persons exist whose present or past affiliation with the Agency is not classified and who have knowledge of facts relevant to plaintiffs' appeal; however, plaintiffs' counsel were not allowed to interview such persons and, on information

and belief, such persons did not testify before or otherwise provide information to the Helms Panel.

5.14 Defendants treat corporations, entities or persons with whom the United States has a contract or other claim against the United States involving secret services or goods differently from defectors like plaintiffs who have a claim against the United States relating to secret services.

5.15 Defendants effectuate such unequal treatment by selectively invoking the Totten Doctrine to bar judicial enforcement of contracts involving such secret services in cases involving defectors, but not for those involving corporations, entities or persons that supply the government with secret goods or services.

5.16 When litigating with corporations, entities or persons other than defectors, defendants cooperate to facilitate the lawful resolution of such claims, whether in court, in an administrative setting, or in private dispute resolution. In so doing, defendants cooperate with claimants to take special precautions to protect classified information by, for example, sealing court rooms, sweeping them for listening devices, and providing security clearances for attorneys. In this manner, the disputes are resolved under law with due process. Classified information, including information relating to intelligence sources and methods, is utilized in the process without disclosure to unauthorized persons.

5.17 In contrast, defendants do not similarly cooperate with defectors who have claims against them involving secret services. Defectors are accorded no due process and their claims are not resolved in accordance with the law.

5.18 The unequal treatment of defectors constitutes discrimination based on national origin and is therefore subject to strict scrutiny. To the extent dispute resolution with defectors requires special considerations, defendants have not properly adopted procedures narrowly drawn to meet any compelling need to protect intelligence sources and methods or classified information.

5.19 There is no legitimate or rational basis to justify defendants' unequal and discriminatory treatment of defectors. To the extent dispute resolution with defectors requires special considerations, defendants have not properly adopted procedures rationally related to fulfilling a legitimate need.

5.20 Defendants have a duty to protect plaintiffs because defendants' actions created a special relationship between them and plaintiffs, and because defendants' actions and lack of action created and continue to enhance the danger to plaintiffs. Defendants have created a special relationship with plaintiffs by placing plaintiffs in a vulnerable situation where plaintiffs are dependent on defendants for basic necessities and even their lives. Defendants are therefore obligated by law to provide for plaintiffs' basic needs and protect plaintiffs from deprivations of liberty. By coercing plaintiffs to undertake espionage activities that ensured their former government would discover what had occurred, defendants created a substantial danger to plaintiffs' personal security. Such danger continues today and will continue for the rest of plaintiffs' lives. Defendants violate the Constitution by being deliberately and recklessly indifferent to this continuing danger.

5.21 As a result of their relationship with defendants, plaintiffs are forced to live under false names

with false identities, and cannot subsist in this country now and as they age without assistance from defendants, which assistance has been wrongfully withheld. By depriving plaintiffs of assistance, defendants have further created and enhanced the danger to plaintiffs. Defendants' failure to provide basic financial and other benefits and to otherwise discharge their constitutional obligation to ensure plaintiffs' personal security compels plaintiffs to travel to Eastern Europe to search for employment and to further reduce their already minimal living expenses, so that they have some resources, however limited, on which to survive when they are no longer able to work at all. In Eastern Europe, plaintiffs' chances of being identified by current or former agents of their former country and subjected to sanctions or blackmail, involving grave risk to their physical security, is greatly increased. Defendants' actions or lack of action are not narrowly tailored to further any compelling state interest, nor are they even rationally related to a legitimate government end.

VI. CLAIMS

6.1 Equal Protection.

Defendants' actions deprive plaintiffs of the equal protection of law guaranteed under the Fifth Amendment to the United States Constitution.

6.2 Due Process.

Plaintiffs have a constitutionally protected liberty and property interest. Defendants' actions violate the Due Process Clause of the Fifth Amendment to the United States Constitution by depriving plaintiffs—without a modicum of fair process—of their constitutionally protected interest in the financial assistance, health and other benefits, and security established by

statute, regulation or Agency conduct, and repeatedly promised and initially provided by the Agency. Defendants' actions further violate the Due Process Clause of the Fifth Amendment to the United States Constitution because defendants have a special relationship with plaintiffs and because defendants actions or lack of action have created and now enhance the danger to plaintiffs. Because of the highly vulnerable situation in which plaintiffs have been placed by defendants, defendants have a constitutional duty to protect plaintiffs' fundamental right to personal security and to provide for plaintiffs' basic needs. Defendants have breached this duty.

6.3 Injunctive Relief.

As a result of defendants' actions, plaintiffs have been irreparably injured and will continue to suffer irreparable injury until such time as they are afforded a constitutionally adequate hearing of their rights as hereinbefore alleged and until defendants cease depriving plaintiffs of their fundamental right to personal security and fulfill their constitutional duty to provide for plaintiffs' basic needs. Plaintiffs are without an adequate remedy at law and are entitled to a preliminary injunction and a permanent injunction, as set forth below in the Prayer.

6.4 Declaratory Judgment.

Plaintiffs are entitled to a declaratory judgment pursuant to 28 U. S. C. § 2201 as set forth below in the Prayer.

6.5 Mandamus.

Plaintiffs are entitled pursuant to 28 U. S. C. § 1361 to an order of mandamus directed to defendant Tenet to carry out his non-discretionary obligations and to cease

depriving plaintiffs of their constitutional rights as requested below in the Prayer.

VII. RELIEF

Plaintiffs pray for the following relief.

7.1 Injunctive Relief.

a. A preliminary injunction requiring the Agency to provide to plaintiffs financial support on a monthly basis equal to the financial support last supplied to plaintiffs by the Agency during a time when plaintiff John Doe was unemployed (adjusted by application of subsequent cost of living index changes) from February 1997 to the date this matter is concluded or until further order of this Court, and

b. A permanent injunction providing the same relief until such time as the plaintiffs have been provided a constitutionally adequate internal Agency hearing on their claim under the rule of law, and until defendants fulfill their constitutional duty to protect plaintiffs' personal security and provide for plaintiffs' basic needs.

7.2 Declaratory Relief.

A declaratory judgment that:

a. The Agency failed to provide a constitutionally adequate process for adjudicating plaintiffs' protected interests and thereby violated plaintiffs' constitutional rights,

b. The decision of Defendant Tenet in plaintiffs' prior appeal is null and void,

c. The Agency is required to provide constitutionally adequate procedures for the conduct of

internal confidential administrative proceedings relating to the adjudication of defector grievances,

d. At a minimum, the Agency's procedures governing the internal confidential administrative procedures must provide for:

i. Written procedures for presenting, prosecuting and adjudicating claims by defectors relating to secret services, copies of which procedures are available to the defector and defector's cleared counsel;

ii. Provision of appropriate security clearances for counsel for the defector to the extent such persons meet the requirements for such clearances and the DCI determines that the provision of such clearances will not harm national security or intelligence sources and methods;

iii. Access by the defector and defector's counsel to unclassified information that would normally be discoverable;

iv. Access by the defector's counsel who have been cleared by the Agency for access to classified information, to that information in the Agency's possession that would normally be discoverable, but for the classification, provided that the DCI may provide for necessary safeguards and limitations on counsel's use of such information, including a proscription from disclosure to the defector, if the DCI determines that such restrictions are necessary for national security purposes or to protect intelligence sources and methods;

v. Access by the defector and the defector's counsel to persons whose present or past affiliation with the Agency is not then classified if such persons may have information that would normally be discoverable;

vi. Access by the defector and the defector's counsel who have received security clearances to persons whose present or past affiliation with the Agency is then classified if such persons may have information that would normally be discoverable under the civil rules of discovery, but for their classified status, provided that the identity of such persons may be concealed and other precautions taken to protect the individual's identity and to otherwise protect intelligence sources and methods as the DCI may deem appropriate;

vii. An opportunity for the defector and the defector's cleared counsel to appear at the hearing, call witnesses, present evidence and argument and to cross examine witnesses;

viii. A final decision by the DCI which shall be written and shall include findings of fact and conclusions of law addressing each of the defector's claims according to law;

ix. An opportunity for the defector and the defector's cleared counsel to read the DCI's final decision and the supporting findings of fact and conclusions of law and the further right to seek reconsideration of the same if the defector believes that a material error as

to fact or law has occurred or that a manifest injustice has been done; and

x. An independent and timely review by the Agency's Inspector General at the conclusion of the internal Agency proceedings if requested by the defector.

e. The holding of *Totten* v. *United States* and its progeny relating to the judicial enforcement of contracts for secret services do not apply to internal confidential administrative hearings conducted by the Agency and that if contract claims relating to secret services are presented in such internal confidential administrative hearings such claims as well as other lawful claims should be adjudicated on the merits according to law.

f. Defendants are violating plaintiffs' constitutional rights by failing to protect plaintiffs' personal security and/or to provide for their basic needs, and that defendants are directed to fulfill these constitutional obligations.

7.3 Mandamus.

An order of mandamus compelling defendant Tenet to:

a. Adopt internal Agency regulations, of a classified or unclassified nature, as Defendant Tenet may determine is required according to law, to implement the judgment of this Court;

b. Conduct a constitutionally adequate hearing of plaintiffs' claims according to such internal Agency regulations and procedures as may be adopted by the Agency in compliance with the

judgment of this Court and adjudicate plaintiffs' claims under the rule of law;

c. Cease depriving plaintiffs of their constitutional rights and to protect plaintiffs' personal security and provide for their basic needs.

7.4 Other Relief

Such other interim or permanent relief as the Court may deem just and proper, including the award to plaintiffs of their costs and reasonable attorneys' fees.

DATED this 30th day of March, 2000.

PERKINS COIE LLP

By /s/ STEVEN W. HALE
STEVEN W. HALE, WSBA #5993
Elizabeth A. Alaniz, WSBA #21096
Attorneys for Plaintiffs

APPENDIX I

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Civil Action No. C99-1597L

JOHN DOE AND JANE DOE, PLAINTIFFS

v.

GEORGE J. TENET, ET AL., DEFENDANT

DECLARATION OF WILLIAM H. MCNAIR

Before: Judge LASNIK

I, William McNair, hereby declare and say:

1. I am the Information Review Officer ("IRO") for the Directorate of Operations ("DO") of the United States Central Intelligence Agency ("CIA" or "Agency"). The Directorate of Operations is the CIA's Clandestine Service, and is responsible for, among other things: conducting foreign intelligence and counterintelligence activities through various means, including human sources; conducting covert action; conducting liaison with foreign intelligence and security services; supporting clandestine technical collection; and coordinating CIA support to the Department of Defense. I have held operational and executive positions in the intelligence agencies of the United States Government since 1962, and with the CIA since 1982. I served as Associate TRO for the DO from July 1993 until I was appointed to my present position in February 1994.

2. As DO/IRO, I am responsible for the review of records maintained by offices in the DO that may be responsive to Freedom of Information Act ("FOIA") or Privacy Act requests, as well as to requests from the Department of Justice in criminal or civil litigation. I am also responsible for conducting classification reviews with respect to information originated by the DO, or otherwise implicating DO interests, including any and all Agency regulations or statutes that govern Agency actions towards Agency employees, assets, sources, defectors, etc. I am authorized to sign declarations on behalf of the Agency regarding the existence of any such regulations or statutes, and to discuss or describe the contents of any relevant regulations or statutes under the cognizance of the Agency.

3. Through the exercise of my official duties, I have become familiar with the major issues in this civil action, and with the allegations of plaintiffs that they are entitled to lifetime benefits from the Agency. The statements herein are based upon my personal knowledge, information made available to me in my official capacity, the advice and counsel of the CIA Office of General Counsel, and conclusions I reached and determinations I made in accordance therewith.

4. I have been informed that plaintiffs allege that they committed espionage upon the request of the Agency, were sponsored by the Agency to defect to the United States pursuant to Section 7 of the Central Intelligence Agency Act of 1949, 50 U.S.C. §403h (commonly known as "PL-110"), and did in fact defect to the United States where they now reside. I have been informed that plaintiffs further allege that they are entitled to lifetime benefits from the Agency pursuant to PL-110, an Agency policy or regulation established

pursuant to PL-110, or some other unspecified Agency policy or regulation providing for lifetime benefits to defectors or a certain class thereof.

5. The Directorate of Operations is the CIA directorate responsible for the processing of individuals brought into the United States by CIA under the authority of PL-110. As the court may be aware, other federal agencies may bring individuals into the United States under PL-110. As DO/IRO, I have full access to all information concerning the Agency's responsibilities under PL-110. I have specifically reviewed such information for any regulations or internal CIA policies concerning PL-110 with respect to any provisions of subsistence assistance to be provided to individuals brought into the United States under the authority of PL-110. I can inform the court unequivocally that there are *no* Agency or other US federal regulations that require the CIA to provide lifetime subsistence assistance to individuals brought into the United States under the authority of PL-110. **Neither PL-110, nor any other law, statute, regulation, internal policy, unstated principle or anything else has ever before, or does now, obligate the Agency to provide any form of lifetime financial assistance to individuals brought into the United States by CIA under the authority of PL-110.**

6. There is an agreement between the CIA and the Department of Justice in which CIA promised to DOJ that CIA would ensure that individuals whom the CIA brought into the United States under the authority of PL-110 would not become public charges before such time that they either attained United States citizenship, or were eligible to become United States citizens. The Agency has a regulation to this effect as well. However, I have been informed that plaintiffs in this

case claim that they are presently United States citizens.

7. On page 10, lines 12-17, of this Court's 7 June 2000 Order, the Court states that, because the Agency has reviewed and approved "for public filing all papers filed by plaintiffs thus far" that "the Court is confident that the case may be litigated without requiring the disclosure of national security secrets. . . ." I wish to explain the purpose of the Agency's review of the Complaint filed in this case.

8. I am the individual who, on behalf of the Agency, has conducted the review of the plaintiffs' complaint and other pleadings and posed no objection to the filing of such pleadings in open court. The CIA does not conduct a classification review, per se, of court pleadings in cases such as these. Plaintiffs pleadings contained mere allegations which, absent official US Government confirmation, did not constitute classified information. The purpose of my review, therefore, was to determine whether certain allegations, in themselves, could be so harmful to national security that I should object to their being disclosed. Such an allegation might be to name a specific individual to be a CIA officer. Whether or not true, such an allegation can jeopardize the physical safety and financial well-being of the named person, as well as his or her family. In cases when the allegation is true, the potential threat also extends to intelligence sources with whom that officer had contact. Thus, my review of a pleading generally looks to those allegations that, regardless of their truth, would threaten the national security or the safety and well-being of innocent persons. Individuals submit pleadings to CIA for such a review either voluntarily or because they have been granted a security

clearance by CIA and, as a condition of receiving such a clearance, are required to submit their pleadings. (In which category plaintiffs and their counsel fall can only be discussed in a classified pleading.)

9. In this case, any Agency response to the factual assertions made in any of plaintiffs' pleadings, whether to either confirm or deny the allegations contained therein, would be classified information and could not be filed in open court. The reason for this is that, while mere allegations made by individuals about the Agency are not classified in most circumstances, when such allegations are either confirmed or denied by the Agency (or by the United States Government in general) they then bear the imprimatur of an official statement, at which point, at least in the instant case, national security issues would be raised and the matters would become classified.[1]

---

[1] Although not necessarily self-evident, the denial of such a relationship would itself reveal classified information. If the CIA were to deny a relationship every time one did not exist, then any time the Agency refused to confirm or deny a relationship, it would be tantamount to an admission that such a relationship does in fact exist. Such a procedure would obviously reveal the very information that the CIA seeks to protect (i.e. a current or past covert relationship) and would risk national security.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed this 17 day of July 2000

/s/ WILLIAM H. MCNAIR
WILLIAM H. MCNAIR
Information Review Officer
and
Records Validation Officer
Central Intelligence Agency

No. 03-1395

Supreme Court, U.S.
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In The

Supreme Court of the United States

GEORGE J. TENET, individually and as Director of CENTRAL INTELLIGENCE and DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, and UNITED STATES OF AMERICA,

Petitioners,

v.

JOHN DOE and JANE DOE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether *Totten v. United States*, 92 U.S. 105 (2 Otto) (1875), empowers the Executive in a case presenting colorable constitutional claims to deprive courts of subject matter jurisdiction and to circumvent the requirements of the state secrets privilege and the procedural safeguards of *Reynolds v. United States*, 345 U.S. 1 (1953), based solely on the Executive's unilateral and conclusory assertion that disclosure of state secrets is inevitable.

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STATEMENT

Petitioners rely on *Totten v. United States,* 92 U.S. 105 (2 Otto) (1875), for the proposition that the judiciary has no subject matter jurisdiction to hear any case presenting colorable constitutional claims if the case touches upon national security issues and that upon the Executive's request, and without the exercise of any judicial discretion, such a case must be summarily dismissed.

The Ninth Circuit held that *Totten* does not require immediate dismissal of the Does' case and the case is governed by the state secrets privilege, "a separate aspect of the decision in *Totten* that has evolved into a well-articulated body of law addressing situations in which security interests preclude the revelations of factual matter in court." (App. 18a.) The panel observed that in the more than 125 years since *Totten*, the "constitutional protection of the right to due process of law has developed into an assurance in most instances of *some* fair procedure, secret or open, judicial or administrative, before governmental deprivation of liberty or property becomes final." (*Id.*)

The Ninth Circuit relied on *United States v. Reynolds,* 345 U.S. 1 (1953), the landmark state secrets case in which this Court held that it is the responsibility of the judiciary to determine the validity of any claim of state secrets privilege. The procedures governing this determination have been articulated by this Court. While courts examining the claim of privilege properly give great weight to the Executive's position, it remains a judicial function to determine what evidence must be excluded to protect national security and whether the case can go forward on some basis.

The Ninth Circuit also relied on *Webster v. Doe,* 486 U.S. 592, 603 (1988), a case involving claims by a covert Central Intelligence Agency employee, where this Court confirmed the applicability of the state secrets privilege to cases involving the CIA and its covert activities and noted that a "serious constitutional question" would arise if consideration of the Does' constitutional claims were foreclosed. This Court refused to dismiss summarily the *Webster* plaintiff's claims against the CIA and instead instructed that "the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources and mission." 486 U.S. at 604.

The Ninth Circuit acknowledged "that it could very well turn out, after further district court proceedings, that the Does will still be left without redress even if everything they allege is true" because when the "government asserts that the interests of individuals otherwise subject to redress must give way to national security interests for the larger public good, the result can end in a balance tipped toward the greater good, with the resulting unfairness to the individual litigants as the acknowledged corollary." (App. 18a.-19a.) The Ninth Circuit's decision is conservative, respects national security and breaks no new ground.

1. Respondents, John and Jane Doe, seek in this action to compel the CIA to provide a procedurally fair internal hearing and apply substantive law to their claims for financial assistance and personal security, all within the secure confines of the CIA. To achieve this, as the

district court found, it is not necessary to litigate in the district court the classified details of their espionage activities.

2. The Does and their counsel have taken extensive precautions to prevent disclosure of any classified information. In addition to using pseudonyms and excluding any identifying detail in their court filings, the Does' counsel have CIA security clearances and the CIA has reviewed and approved for public filing the complaint and all other documents prior to filing in this case, including this response to the Petition for Writ of Certiorari. (App. 22a.-23a.)

3. John and Jane Doe, former Cold War defectors who were coerced by the CIA into being intelligence sources and who now are U.S. citizens, bring constitutional claims involving violations of property and liberty interests under the Fifth Amendment of the Constitution. John Doe was a high-ranking diplomat for a country considered an enemy of the United States during the Cold War. While John Doe and his wife were posted on diplomatic mission in a third country, they approached a person attached to the U.S. embassy and requested assistance in defecting to the United States. The Does had no interest in conducting espionage. CIA agents intervened, taking the Does to a CIA safe house where they were held for nearly 12 hours, time sufficient to create extreme danger of exposure if they returned to their embassy. The CIA officers employed intimidation and coercion to cause the Does to remain at their diplomatic post and conduct espionage for the United States for a period of time. The CIA officers stated that after this period the Agency would arrange for travel to the United States and ensure financial and personal security for life. The CIA officers professed

that such support was "required by law." As with any agent recruitment at this level, the terms of recruitment and commitments made were approved at the highest level of authority at the CIA. (R.App. 1-3, ¶¶ 2-4; 21-23)[1]

The Agency pressured the Does into undertaking espionage that would virtually guarantee that their activities would become known to the first nation, putting them at lifelong risk of retaliation, including assassination. Believing they had no choice, the Does complied with the CIA's demands for progressively more dangerous activities. (R.App. 3, ¶¶ 5-6)

The Does were eventually brought to the United States and provided new identities and backgrounds by the Agency. The Agency offered to "retire" the Does, but the Does desired to work and become integrated into American society. The Agency provided health care, language training, educational support and assistance in finding employment. The Agency continuously assured the Does, at the time of recruitment, during their espionage missions and for years after resettlement in the United States that the Agency would provide a "safety net" for life, stating that this was "required by law" and by the fact that the Does had "PL-110 status."[2] As soon as permitted by law, the Does became U.S. citizens. (R.App. 1-4)

[1] "R.App." refers to the separately bound appendix submitted by Respondents with this response to the Petition for Writ of Certiorari.

[2] The CIA administers a program referred to as "PL-110" that involves (a) bringing into the United States defectors and certain other "essential aliens" outside normal immigration procedures and (b) the

(Continued on following page)

With the Agency's substantial assistance, John Doe found employment. (R.App. 4, ¶ 8) In 1997, John Doe lost his job. Pursuant to prescribed procedures, the Does contacted the CIA and requested assistance. They received no response for nearly four months. When a response did come, the Agency's letter expressed gratitude and respect for past services to the United States but indicated regret that no funds were available due to "budget constraints." (R.App. 6, ¶ 15) No other reason was given for not assisting the Does.

John Doe's efforts to find new employment were limited by his age and his security arrangements with the Agency that required him to use the false name and background created by the Agency. The Agency, however, refused to assist, as it had assisted in the past, by talking with senior management of potential employers to mitigate the problems presented by John Doe's situation, including his false credentials. (R.App. 6)

When further attempts at obtaining Agency assistance failed, the Does sought legal representation. (R.App. 6, ¶ 16) The Agency subsequently granted the Does' counsel security clearances to represent the Does. (R.App. 18, ¶ 2) In 1997, an Agency representative explained that the Agency's refusal to provide further benefits was based on its after-the-fact, subjective evaluation of the services performed (with no mention of the previously cited "budget constraints"), that the Agency had determined that the benefits previously provided were "adequate" for the

provision of assistance and security to these people. (R.App. 24-31; 137-146; App. 3a.)

"services rendered," and that the Does would receive nothing further. The Agency representative advised that the Does could "appeal" the decision to the Director of Central Intelligence ("DCI"). (R.App. 18-19)

Pursuant to these cursory instructions, the Does prepared an appeal based on the "value of the services performed." In connection with this effort, the Does' counsel repeatedly requested from the Agency copies of regulations governing the appeal process, the PL-110 program and access to records potentially relevant to this matter that were classified within the level of security clearances granted the Does' counsel. These requests were ignored or denied. (R.App. 18-20)

Notwithstanding these obstacles, the Does filed their appeal to the DCI. Subsequently, Agency counsel orally advised the Does' counsel that the Deputy Director of Operations (not the DCI) had denied the appeal. Agency counsel advised that a further appeal was possible to the Helms Panel, a panel of former Agency officials. Confused about the appeal process given the inconsistent and contradictory oral information provided by the Agency, the Does again requested copies of the regulations or rules governing appeals and written confirmation of the Agency's appeal determination. Both requests were ignored. (*Id.*)

The Does pursued an appeal to the Helms Panel, again requesting access to documents, persons and copies of pertinent regulations governing appeal. (R.App. 21) All requests were denied or ignored. The Helms Panel review thus proceeded without participation by the Does, other than the written appeal statement, which the Does later

learned was directed to the wrong issues because of misinformation provided by the CIA.

Agency counsel subsequently told the Does' counsel orally that the DCI had determined, based on the Helms Panel recommendation, that the Agency should provide certain benefits to the Does for no more than one year, and nothing thereafter. (R.App. 22)

Agency counsel subsequently advised that in order to accept the benefits of the DCI's decision, the Does would have to execute complete releases. The Does' counsel requested clarification of whether the appeal process, including the DCI's decision, was an adjudication of the Does' rights, and if so, how it could be predicated on a demand for a release. The Agency did not respond. (*Id.*) The additional benefits were not provided.

When the Does' counsel stated to the Agency that its failure to provide a fair process and apply accepted legal principles left the Does with no other option than to go to court, the Agency lawyer's response was "how are you going to get around *Totten*?"

Having exhausted the only administrative process they were given, the Does filed suit in the district court alleging violations of their substantive and procedural due process rights, based both on property and liberty interests, and seeking by way of declaratory relief, mandamus and injunction a constitutionally adequate internal CIA process, including a declaration that the CIA is required to follow substantive law. (App. 117a.-142a.)

4. Defendants moved to dismiss under Fed. R. Civ. P. 12(b)(1) and (6). The district court denied the motion, finding that "litigation of plaintiffs' claims will not require

public revelation of the defendants' intelligence gathering methods," noting the Supreme Court's determination in *Webster* that "the District Court has the latitude to control any discovery process which may be instituted so as to balance [plaintiffs'] need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." (App. 106a.-107a.) The district court further observed that defendants have reviewed and approved for public filing all papers and that "defendants may request leave to submit materials in this matter under seal or *in camera*, or may assert the state secrets privilege recognized in *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953)." (App. 107a.) The district court also found that "the public interest will not be harmed" because the court "understands the need for confidentiality and has the power to allow motions to be filed under seal and heard in closed hearings." (App. 93a.)

Defendants then filed a Motion for Summary Judgment or Alternatively a Renewed Motion to Dismiss. Having feigned ignorance about a "PL-110 program" in their first motion, in their second motion defendants admitted the existence of a program for resettlees[3] "commonly known" as "PL-110" and the existence of regulations governing it. (App. 87a.-88a.) Defendants' motion relied on a declaration by a mid-level Agency official (William McNair, an "Information Control Officer"), who offered his legal conclusion that applicable regulations – which

[3] Resettlees is the word used by the CIA for defectors. (R.App. 61-110, trans. pp. 15-84, trans. p. 19)

had not been provided to the Does or to the court – provided plaintiffs no rights.[4] The Does then sought production under Fed. R. Civ. P. 34 of the regulations referenced in the McNair declaration and noted his deposition. The Agency produced a redacted version of self-selected PL-110 regulations and made Mr. McNair available for deposition. The results of this limited discovery, all accomplished without the assertion of the state secrets privilege by Petitioners, establish that PL-110 regulations provide that the "safety and security" of resettlees are the "continuing obligation of the CIA" and provide for continued financial assistance after resettlees obtain U.S. citizenship, and for life, if appropriate, due to *age, health or financial need* (R.App. 139; 145), and that the standard for obtaining benefits under the PL-110 program is *not* the "value of services" standard the CIA had orally advised the Does applied to their administrative appeal. (R.App. 19)

Mr. McNair also testified that he was involved on behalf of the CIA in judicial proceedings involving classified information on a regular basis. (R.App. 68-71)

The district court denied defendants' second motion, noting that

> [i]n their first motion to dismiss, defendants claimed not to know what PL-110 was. Now, they acknowledge not only the existence of PL-110, but also the existence of CIA internal regulations concerning the PL-110 program and the financial

[4] Plaintiffs moved to strike (R.App. 33-38) and the district court disregarded the legal conclusions (App. 88a. n.6). Respondents object here on the same grounds as in their motion to strike in the district court.

> benefits accorded to defectors. . . . Defendants' initial denial of knowledge of PL-110, followed by their subsequent acknowledgment of PL-110 and related regulations, weaken their credibility.

(App. 87a.-88a.)

5. The Ninth Circuit affirmed in a 2-1 decision. The majority concluded that *Totten* does not require immediate dismissal of this case and that, instead, the case is governed by the state secrets privilege. (App. 27a., 39a.) The majority further acknowledged that it could well be that, "after further district court proceedings, the Does will be left without redress even if everything they allege is true." (*Id.*) The court observed that because the "net result of refusing to adjudicate the Does' claims is to sacrifice their asserted constitutional interests to the security of the nation as a whole, both the government and the courts need to consider discretely, rather than by formula, whether this is a case in which there is simply no acceptable alternative to that sacrifice." (App. 19a.) As such, the majority opinion noted that "[s]tate secrets privilege law prescribes that courts must be sure that claims of paramount national security interest are presented in the manner that has been devised best to assure their validity and must consider whether there are alternatives to outright dismissal that could provide whatever assurances of secrecy are necessary" and concluding that "counterweight role has been reserved to the judiciary [and the judiciary] must fulfill it with precision and care, lest we encourage both Executive overreaching and a corrosive appearance of inequitable treatment of those who have undertaken great risks to help our nation, an appearance that could itself have long-run national security implications." (*Id.*)

6. The Ninth Circuit denied defendants' motion for rehearing or alternatively for rehearing en banc. Writing in dissent, Judge Kleinfeld observed that "I hope the Does' account is fictional (though I do not intimate that it is, having no knowledge). Little could be worse for our ability to engage spies than insecurity about whether they will get what was promised to them. If what the Does allege is true, a serious injustice has been done to them, and the injustice to them is seriously harmful to the long-term security interests of the United States."[5] (App. 75a.)

REASONS FOR DENYING THE PETITION

The Ninth Circuit's decision to let the case proceed in the district court respects national security concerns and the CIA's interest in protecting its sources and methods. The decision is rooted in controlling law from this Court in *Reynolds* and *Webster* and requires the district court to

[5] The serious injustice Judge Kleinfeld noted has been aggravated by the almost five-year delay since the complaint was filed, with no opportunity for the Does to address the merits of their case, notwithstanding the showing of extreme hardship made in the district court (R.App. 1-10) and the Ninth Circuit's order expediting the appeal (R.App. 39). Adding to this injustice is the fact that if the Does had not located counsel to handle their case pro bono (at a cost so far of over $1.6 million), they would have had no way to pursue this case given the resistance by Petitioners to providing them a fair hearing. Access to justice should not be so delayed or so costly, particularly where constitutional liberty and property interests are involved. Respondents note further that Petitioners' argument regarding recourse to the CIA's Inspector General to address Respondents' claims (Petition at 12) is not supported by the record and, in this case at least, is not accurate. Respondents have asked Petitioners to withdraw their argument.

balance the interests of the Does for a forum to consider their constitutional claims with the Agency's important interests. The Ninth Circuit treatment of *Totten* is consistent with the treatment given *Totten* by all circuit courts, including *Guong v. United States*, 860 F.2d 1063 (Fed. Cir. 1988), which Petitioners misread. *Totten* is not jurisdictional, rather it is a part of the state secrets privilege. Petitioners' interpretation of *Totten* would deprive the Does of a forum for their constitutional claims and thus directly conflicts with the holding of this Court in *Webster* that such a jurisdictional bar would raise grave constitutional questions.

I. *TOTTEN* IS PART OF THE STATE SECRETS PRIVILEGE AND IS NOT A JURISDICTIONAL BAR TO CASES TOUCHING ON THE CIA'S COVERT INTELLIGENCE ACTIVITIES

Judicial discussion of *Totten* in the century and a quarter since it was decided makes clear that *Totten* is not a jurisdictional bar. *See, e.g., Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991). *Totten* is recognized as an early kernel of the state secrets privilege (or of its broader family, Executive privilege). *See, e.g., Rubin v. United States ex rel. Indep. Counsel*, 119 S. Ct. 461, 462 (1998) (dissent from denial of certiorari, discussing ability of courts to recognize "new privileges," citing *Totten* as example for "state secrets privilege" (Breyer, J., dissenting)); *In re Sealed Case*, 121 F.3d 729, 736 (D.C. Cir. 1997) (en banc) (discussing history of Executive privilege, citing *Totten* as "early" ruling that Executive may withhold state secrets); *Zweibon v. Mitchell*, 516 F.2d 594, 625 & n.80 (D.C. Cir. 1975) (en banc) (describing *Totten* as "foreshadow[ing]" the "*evidentiary* privilege of the Executive

Branch with respect to production of documents whose publication could endanger military or diplomatic secrets" (emphasis added)).

A. *Reynolds* Treats *Totten* as Part of the State Secrets Privilege

The Ninth Circuit correctly held that *Totten* is an early expression of the evidentiary state secrets privilege. (App. 25a.) More than a century of legal development demonstrates that the policies discussed in *Totten* have been incorporated into the privilege and are subject to the procedures under which the privilege is now governed. In 1953, some 77 years after *Totten*, this Court in *Reynolds* recognized that "[j]udicial experience with the privilege . . . has been limited," 345 U.S. at 7, but noted that the "privilege against revealing military secrets . . . is well established in the law of evidence," supporting this conclusion with citation to a number of cases, first among which was *Totten*, *id.* at 6-7 & n.11.

This Court held in *Reynolds* that *Totten* sets forth a *privilege* rather than a jurisdictional bar and that it represents one extreme of the privilege's application. Discussing the operation of the privilege, this Court cited *Totten* for the proposition that "the claim of *privilege* should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Id.* at 11 & n.26 (emphasis added) (citing *Totten).* Under *Reynolds*, the *court* has ultimate responsibility for determining whether "it [is] obvious" that the "action should never prevail over the privilege." *Id.* at 11 n.26.

B. This Court's Decision in *Weinberger* Does Not Support Petitioners' Position on *Totten*

Petitioners' reliance on *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139 (1981), is misplaced. In *Weinberger*, plaintiffs sought an injunction to block construction of a nuclear weapons storage facility until the Navy issued an Environmental Impact Statement ("EIS"). This Court held that the Navy was not required to prepare a "hypothetical" EIS because there was no statutory basis for such a requirement and because Congress had expressly limited statutory disclosure requirements to exclude classified information. The case was decided on the grounds that Congress had determined statutorily what information could be released, not by application of *Totten*. The passing citation to *Totten* was not the foundation of the decision, a point noted by the concurrence, and merely reflected the policy determination already made by Congress. *Weinberger*, 454 U.S. at 149.

The Ninth Circuit panel in the case at bar noted the distinction between an explicit statutory exemption of the Freedom of Information Act, which was the basis for the decision in *Weinberger*, and the state secrets privilege, which is governed solely by judge-made law. (App. 28a.) The panel opinion considered the reference by the *Weinberger* court to *Totten* as an "explanation, by analogy, concerning why the National Environmental Policy Act ('NEPA') inquiry could not go forward in the court" and noted that the opinion also referenced *Reynolds* in the same context as the "seminal state secrets privilege case." (App. 28a.-29a.)

C. The Circuit Courts Treat *Totten* as Part of the State Secrets Privilege

1. Petitioners fail to cite one circuit court opinion holding that *Totten* is jurisdictional. The Federal Circuit in *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356 (Fed. Cir. 2001), rejected the Executive's attempt to transform *Totten* into a jurisdictional bar. *Monarch* involved a contract debt that evolved out of a loan to an alleged CIA operative to fund certain covert activities in Europe. When the loan was not repaid, Monarch sued the alleged CIA agent and obtained a judgment in the English courts. Unable to collect the judgment, Monarch brought suit in the United States Court of Federal Claims against the United States alleging breach of contract and a takings claim under the Fifth Amendment. The government moved to dismiss, arguing that under *Totten* the court could not entertain a suit alleging a breach of contract involving secret CIA actions. *Monarch*, 244 F.3d at 1358. The trial court denied the motion and the Federal Circuit affirmed. In recounting the events in the trial court, the appeals court stated "[T]he question then is whether the plaintiff, without such discovery, can make a prima facie case that it is entitled to relief on its claim." *Id.* at 1359. The Federal Circuit further recounted with approval the trial court's point "that the Government's successful invocation of the state secrets privilege may very well prevent plaintiffs from making the necessary showing [of a prima facie case], but . . . it is at least possible that through discovery plaintiffs may be able to gather unprivileged information that, when combined with their other evidence, is sufficient to establish a prima facie case . . . . " *Id.* at 1360 (internal quotation marks and citations omitted).

The Federal Circuit did not reach a different result in the earlier case of *Guong*. That case did not hold that it is the *Executive* that decides if it is "inevitable" that state secrets will be disclosed if a case goes forward as Petitioners maintain. While this is the interpretation routinely given *Guong* by the Executive, the opinion does not say this. Indeed, in *Guong* the *court* determined that the case could not proceed without inevitably resulting in disclosure of classified information, although it did so without insisting on the formalities of the state secrets privilege, because in the *court's* view, formal assertion of the privilege would not alter the *court's* conclusion. 860 F.2d at 1067-68. By contrast here, the district court specifically found that it is *not* inevitable that proof of the Does' claim will require public revelation of secret information. (App. 106a.) The Ninth Circuit panel agreed. (App. 35a.-38a.) ("it is not self-evident that the Does, in order to establish [their] relationship [with the CIA], will need to jeopardize state secrets").[6]

[6] Petitioners offered no evidence to support the contention that disclosure of state secrets was inevitable other than conjecture. Indeed, according to Mr. McNair's testimony at deposition, his unclassified declaration submitted by Petitioners (App. 143a.-148a.) was drafted by CIA lawyers working off "boilerplate," and Mr. McNair was unable to identify what part of the declaration was his testimony and what part the lawyers' (R.App. 90-91). Further, Mr. McNair testified that he regularly participates in administrative and judicial hearings and trials involving classified information. (R.App. 68-71). During Mr. McNair's deposition, which occurred after the filing of Petitioners' second motion to dismiss in the district court, Petitioners' counsel specifically noted that they had not asserted the state secrets privilege. (R.App. 120) (CIA attorney Daniel Pines: "We are not asserting a States Secrets Privilege through that sentence [of Mr. McNair's declaration]" and in response to respondents' counsel's follow-up question, Assistant United States

(Continued on following page)

The concurrence in *Guong* makes the point that "[i]n applying *Totten* as precedent today . . . I believe one must consider . . . the state secret privilege." *Guong*, 860 F.2d at 1068 (Nichols, J., concurring). Although the Petitioners cite *Guong* for the proposition of automatic dismissal for all cases involving spies, the opinion does not support that conclusion.

Further demonstrating Petitioners' misreading of *Guong* is *Air-Sea Forwarders, Inc. v. United States*, 166 F.3d 1170 (Fed. Cir. 1999). In *Air-Sea*, the Federal Circuit expressly declined to affirm the lower court's dismissal of a breach of contract claim against the CIA on the ground relied on below – that it was barred by *Totten*. Instead, it affirmed on the ground that plaintiff's claim was barred by a prior settlement. *Id.* at 1172. By so ruling on the merits of the contract issue, the *Air-Sea* court made clear that it did not consider *Totten* jurisdictional. *See also McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003) (discussing *Totten* in context of state secrets privilege).

2. In *Clift v. United States*, 597 F.2d 826 (2d Cir. 1979), the appeals court rejected the government's *Totten* argument, concluding that the district court "acted too precipitately in dismissing the complaint," based on *Totten*, *id.* at 827, and held that the plaintiff there should be allowed an opportunity to pursue his case without the

Attorney Harold Malkin stated "Right. We have not to date asserted the State Secrets Privilege"). The district court acknowledged this and noted that if Petitioners considered national security interests to be threatened, they were free to assert the privilege. (App. 107a.)

secret evidence, *id.* at 830. *See also Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268 (4th Cir. 1980) (en banc) (rejecting *Totten* argument and affirming dismissal only after reviewing classified affidavit submitted in support of the assertion of the state secrets privilege); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1244 (4th Cir. 1985) (affirming dismissal only after review of classified declaration filed in support of the privilege).[7]

3. Prior case law from the Ninth Circuit also is in accord. In *Kasza v. Browner*, 133 F.3d 1159, 1165-66 (9th Cir. 1998), the court affirmed the district court's dismissal, quoting this Court's holding in *Reynolds*, 345 U.S. at 8, that "'[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege,'" and quoting *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983), for the requirement that "'whenever possible, sensitive information must be disentangled from nonsensitive information to allow for "'the release of the latter.'"[8] The court then concluded that, "if the 'very subject matter of the action' is a state secret, then the court should

[7] The *Fitzgerald* court cited another case from that circuit involving the CIA, *Heine v. Raus*, 399 F.2d 785 (4th Cir. 1968), to demonstrate that there are circumstances where, even after the successful invocation of the state secrets privilege, the case is permitted to go forward without use of the classified information. 776 F.2d at 1243 n.12. The *Fitzgerald* court then held that after the privilege is successfully invoked, the court "must consider whether and how the case may proceed in light of the privilege," noting that the court may "fashion appropriate procedures to protect against disclosure." *Id.* at 1243.

[8] Examples of the kinds of nonsensitive information that can be disentangled from sensitive information are provided by the transcript of the deposition of CIA officer William McNair and the redacted PL-110 regulations produced by the CIA. (R.App. 51-131; 137-146)

dismiss . . . *based solely on the invocation of the state secrets privilege.*" *Id.* at 1166 (emphasis added) (quoting *Reynolds*, 345 U.S. at 11 n.26, and citing *Totten*, 92 U.S. at 107). In a concurring opinion, Judge Tashima noted that this Court has explained the purpose of the state secrets *privilege*, quoting *Totten* as support for this conclusion. *Id.* at 1179.

D. The Ninth Circuit Is Correct That Adherence to the Procedures for Asserting the State Secrets Privilege Is Required

The Ninth Circuit correctly relied on *Reynolds* in holding that "to invoke the state secrets privilege, a formal claim of privilege must be 'lodged by the head of the department which has control over the matter, after actual personal consideration [of the evidence] by that officer.'" (App. 29a.) The majority observed that while this may be considered a formality, "formalities often matter a great deal, and they certainly matter here." (*Id.*)

The procedures established in *Reynolds* are based on the recognition that the privilege can result in extreme unfairness and therefore must be applied only where absolutely necessary. (App. 30a.) Given the need for extreme caution where the outcome is so drastic, this Court established strict procedures that must be met. The privilege "is not to be lightly invoked." (*Id.*) "The court itself must determine whether the circumstances are appropriate for the claim of privilege . . . . " *Reynolds*, 345 U.S. at 7-8.

The panel cited *Webster* as confirmation that, "particularly where constitutional claims are at issue, the *Reynolds* inquiry requires courts to make every effort to

ascertain whether the claims in question can be adjudicated while protecting the national security interests asserted." (App. 33a.) The panel further noted the *Webster* holding that "a 'serious constitutional question' would arise if consideration of Does' constitutional claims were foreclosed [and] where constitutional issues are raised, the courts must consider the full panoply of alternative litigation methods . . . – *in camera* review, sealed records, and, if necessary, secret proceedings – before concluding that the only alternative is to dismiss the case and thereby deny the plaintiff's claimed constitutional rights." (App. 34a.) While the framework established by *Reynolds* requires deference to the Executive's expertise, it recognizes that the judiciary must not abdicate control over evidence in a case to the whim of the Executive. *Ellsberg*, 709 F.2d at 58 ("[I]t is essential that the courts continue critically to examine instances of [the state secrets privilege's] invocation.").

The Executive's prerogative is to assert the state secrets privilege; but it is the judiciary's prerogative and indeed constitutional obligation to determine its applicability and effect in any given case. *Reynolds*, 345 U.S. at 9-10; *United States v. Nixon*, 418 U.S. 683, 704-05 (1974).

II. THIS COURT'S DECISION IN *WEBSTER* DEMONSTRATES THAT THERE IS NO EXCEPTION TO THE REQUIREMENT TO APPLY THE STATE SECRETS PRIVILEGE IN CASES INVOLVING THE CIA AND ITS COVERT INTELLIGENCE ACTIVITIES

Webster v. Doe, 486 U.S. 592 (1988), involved constitutional claims by a former CIA covert employee for alleged discrimination based on sexual orientation. The plaintiff

alleged, *inter alia*, violation of his constitutional rights to property and liberty. *Id.* at 596. This Court held foursquare that a person who had a secret relationship with the CIA and presented colorable constitutional claims had a right to go forward and litigate them, although, as here, the CIA could still assert the state secrets privilege to avoid disclosure of state secrets.

In *Webster*, this Court held that pursuant to statutory authority the DCI had absolute discretion to terminate an employee and that such decisions were not reviewable under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2). 486 U.S. at 599-602. This Court, however, expressly rejected the CIA's contention that plaintiff's constitutional claims were nonreviewable, noting the "'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* at 603 (citing *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). In so ruling, this Court noted that "the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Id.* at 604.

Petitioners' argument in this case fails to distinguish *Webster* and in fact supports the Does' position. Petitioners concede that as "long as a covert CIA employee's name is not identified, certain aspects of his or her activities . . . can be revealed or litigated without necessarily exposing classified information." (Petition at n.4) The same is true here, as the Does have proceeded, like the plaintiff in *Webster*, by using pseudonyms. Petitioners' conclusion that

no case touching upon a covert relationship may ever go forward is not supported by the record or logic. Petitioners fail to show how the details of the "covert" relationship of the *Webster* plaintiff are any less secret than that of the Does' relationship here. Petitioners offer no basis for the assumption that, for example, the details of the covert servicing of electronic equipment at a technical intelligence collection site directed at foreign terrorists by a "covert electronics technician"[9] (as the *Webster* plaintiff is described) would be any less secret than the Does' activities.[10] Be that as it may, the point is that proceeding under a "Doe" pseudonym precludes any unauthorized disclosure of sensitive information as to the individual's relationship with the CIA and allows the court to consider whether the plaintiff can make out a prima facie case without use of classified information.

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[9] Covert is synonymous with secret and a covert agent or employee is presumptively no different than a "spy." They both have a secret relationship with the CIA and undertake secret missions. *Guong*, 860 F.2d at 1065 ("secret and covert are synonymous").

[10] The panel posited that the "only obvious difference between *Webster* and this case for present purposes is that the Doe in the *Webster* case was a domestic employee while the Does in this case are foreigners who were engaged to spy for the United States abroad." (App. 34a.) However, the *Webster* opinion does not state that the plaintiff in that case was a domestic employee. The fact that the employee was covert presumptively indicates that he was engaged in covert activities abroad, consistent with the CIA's foreign intelligence mission. Whether the Doe in *Webster* worked domestically or overseas, the fact that he was a covert employee puts him in the same category as Respondents – persons carrying out secret duties for the CIA undercover.

III. PETITIONERS' POLICY ARGUMENT RUNS AFOUL OF THE CONSTITUTION AND THIS COURT'S RULINGS IN *WEBSTER* AND *REYNOLDS*

Petitioners argue that *Totten* is critical to the nation's security and foreign relations interests and the state secrets privilege does not adequately protect the CIA's interests. (Petition at 20-27) Much of Petitioners' argument concerns the need for secrecy in foreign intelligence operations. With that part of the argument Respondents do not take exception. Respondents do take exception to the conclusion that to ensure the confidentiality of national security information one must read *Totten* to effectively remove from the judiciary its constitutional obligations. Such an abdication of the judiciary's traditional and constitutional obligations to the Executive is not justified.

The role of a co-equal, independent and impartial judiciary in safeguarding the rule of law in our democracy is axiomatic. Petitioners' contention that the courthouse door must remain forever closed even to the most deferential of judicial review runs afoul of the fundamental precept of the availability of the courts to enforce the rule of law and ensure procedural fairness when official conduct deprives citizens of liberty or property. The need to protect secrets on matters pertaining to national security is beyond dispute, but so is the importance of checks and balances in our system of democracy. *See Nixon*, 418 U.S. at 704-05 (rejecting claim that separation of powers doctrine precludes judicial review of the Executive's claim of privilege, and reaffirming that "it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege") (citing U.S. Const. art III, § 1; *The*

Federalist No. 47, at 313 (S. Mittell ed., 1938); and quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

Petitioners' argument that the "CIA's covert operations are designed to acquire secrets of foreign countries in order to protect the life and liberty of United States citizens" (Petition at 21) is not contested, but Respondents do contest the proposition that the Executive may ignore the Constitution. It is worth noting in the context of this argument and the current post-9/11 climate, that in its 1953 decision in *Reynolds* this Court recognized that the nation was then faced with grave danger and nonetheless found it appropriate to balance the interests of litigants in having a forum and an opportunity to litigate their claims with the national interests in protecting the nation. *Reynolds*, 345 U.S. at 10.[11]

The state secrets privilege and the procedures required by *Reynolds* have for over one-half century protected the nation's secrets while balancing the need for secrecy with other constitutional interests. Petitioners offer no evidence to the contrary other than conjecture. Petitioners' basic premise is that courts cannot be trusted,

[11] The *Reynolds* decision was rendered at the height of the Cold War. Between 1950 and 1953, the Soviet Union had shot down no less than five U.S. military reconnaissance aircraft, and Strategic Air Command aircraft were conducting reconnaissance missions against the Soviet Union while the nation rushed to expand and deploy its nuclear capable forces. *See generally* Symposium at Strategic Air Command Museum, *Cold War in Flames: The Untold Story of Airborne Reconnaissance* (Sept. 12, 1998); presentation by Greg Skavinski, *Secrets of the Cold War*, U.S. News & World Rep., Mar. 15, 1993; Kohn & Harafan, *Strategic Air Warfare* (Office of Air Force History) United States Air Force, 1988, pp. 90-119.

are not competent to deal with issues that touch upon national security and, even in any event, the CIA should not have to be burdened with the procedures of the state secrets privilege. Respectfully, Respondents disagree. So does the Ninth Circuit panel (App. 17a.-31a.), and so does this Court in *Webster*.[12]

Petitioners' reference to "full fledged discovery" in the district court (Petition at 23) is unnecessarily alarmist, taken out of context and overlooks the deference the panel gave to the national security interests present (App. 18a.) (recognizing that Respondents' interest may in the end have to give way to the "larger public good"); (App. 34a.) (noting the prescription in *Reynolds* to give appropriate attention to "the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission"); and (App. 29a. n.10; 39a.) (directing the district court on remand to allow the CIA the opportunity to assert the state secrets privilege); the district court's

[12] This Court's decision in *CIA v. Sims*, 471 U.S. 159 (1985), cited by Petitioners (Petition at 21), supports the premise of the importance of the CIA's work and maintaining the confidentiality of its sources and methods. It does not, however, support Petitioners' premise that *Totten* must be transformed into a jurisdictional bar to accomplish these goals. *Sims* involved a Freedom of Information Act request for classified information. This Court upheld the statutory exemption in 5 U.S.C. § 552(b)(3)(A) against public disclosure based on the DCI's statutory obligation to protect intelligence sources and methods. 471 U.S. at 167-73. It did not involve *Totten* or create a CIA exception to the state secrets privilege. Similarly, Petitioners' citation (Petition at 21) to *Snepp v. United States*, 444 U.S. 507 (1980), and *Department of Navy v. Egan*, 484 U.S. 518 (1988), speaks to the importance of maintaining the confidentiality of classified information, a proposition not challenged by Respondents, the district court, or the Ninth Circuit. Neither *Snepp* nor *Egan* addresses the issues in this case.

own cautionary statements about procedures that will be employed to protect national security; and the limited remedy sought by the Does – a fair *internal* CIA hearing applying the rule of law.

Nor does Petitioners' argument square with this Court's decision in *Webster* that the judiciary is required to balance the needs and interests of a plaintiff presenting colorable constitutional claims with the "extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Webster*, 486 U.S. at 604. The panel below respects this basic precept of our democracy in holding that the "national interest normally requires both protection of state secrets and the protection of fundamental constitutional rights." (App. 38a.)

It may be expedient for the CIA not to have to comply with the required procedures of the state secrets privilege, but Petitioners have not demonstrated either that the burden of doing so in this case outweighs the constitutional interests served by compliance or that any secrets will be compromised in the process here. It is a matter worthy of judicial notice that the only branch of government that does not leak secrets is the judiciary.

CONCLUSION

The majority opinion by the Ninth Circuit panel poses absolutely no risk to national security. It requires specifically that "[o]n remand, the government should be given the opportunity before the case proceeds further to assert the state secrets privilege should it choose to do so." (App. 29a.) The majority opinion further requires that "[w]hen evaluating the invocation of the state secrets privilege, the

district court must give the 'utmost deference' to the government's evaluation of what constitutes a state secret that will jeopardize national security." (App. 36a.) The district court also indicated its understanding of the deference to be given any claim of state secrets by the government. (App. 106a.-107a.) (noting the "extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission," quoting *Webster,* 486 U.S. at 604).

The reasons the Agency has chosen not to assert the state secrets privilege to date are obvious. There is no actual risk to national security presented by this case. The Does' complaint seeks an order requiring the CIA to conduct a fair *internal* CIA administrative hearing consistent with due process and substantive law. (App. 117a.-142a.) In such an internal hearing, secrecy is assured and Petitioners do not claim otherwise. Plainly, the CIA's two-prong goal in this case is (a) to exclude the judiciary from any consideration of constitutional issues by mutating *Totten* into a jurisdictional bar instead of part of the state secrets privilege and (b) to avoid any judicial requirement that CIA administrative procedures comply with due process and substantive law. Neither goal is appropriate and both violate basic constitutional precepts.

The majority opinion is conservative, respects national security and breaks no new ground. It is completely consistent with Supreme Court authority, as well as other circuit opinions.

Respondents respectfully ask this Court to deny the Petition.

Respectfully submitted,

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The Honorable Robert L. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN DOE and JANE DOE, husband and wife, Plaintiffs, vs. GEORGE J. TENET, Individually and as Director of Central Intelligence and Director of the Central Intelligence Agency, and THE UNITED STATES OF AMERICA, Defendants.	No. C99-1597L DECLARATION OF JOHN DOE

JOHN DOE states as follows:

1. I am the John Doe denominated as a plaintiff in the caption, but this is not my real name. I am proceeding in this matter using John Doe as a pseudonym for reasons of personal security. I make this declaration in the name of John Doe based on my personal knowledge. I am over 21 years of age and otherwise fully competent to testify herein.

2. My wife and I were formerly citizens of a foreign nation then considered to be an enemy of the United States, and I was a high-ranking diplomat for such foreign nation. We were well educated and highly successful in our society, but were disenchanted with

Communism. For a period during the Cold War, we were residing in a second foreign nation, where I held a senior diplomatic assignment. We resided in the embassy compound and were subject to constant surveillance by the first nation's security service.

3. During this time and at great risk, my wife and I approached a person we knew to be attached to the United States embassy and requested assistance in defecting to the United States. Rather than providing the requested assistance, CIA ("Agency") agents sequestered the us in an Agency safe house. The agents employed various forms of intimidation and coercion to convince us that we could not survive in the United States without Agency assistance. The agents asserted that, to obtain such assistance, we would be required to remain at our current diplomatic post and conduct espionage for the United States for a specified period of time, after which time the Agency would arrange for travel to the United States and ensure financial and personal security for life. The agents assured us that the assistance being offered was approved at the highest level in Washington and was, in fact, required by the laws of the United States.

4. We resisted the requests of the agents, stressing that all we sought was assistance in defecting. The agents persisted, using tactics that induced great fear and uncertainty in us. During this time, a CIA agent, said to be the Chief of Station, made several calls to CIA headquarters to receive instructions and approval of the offers being made to us. After being sequestered in an Agency safe house for nearly 12 hours, and in reliance on the Agency's promises of assistance, we reluctantly

agreed to work "in place" for the United States conducting espionage activities.

5. After carrying out our end of the bargain at great personal risk for the requisite time period, we requested that the Agency arrange for our defection and travel to the United States. Instead of making immediate arrangements for defection, the Agency pressured us to undertake more and different types of espionage activities that would expose us to far greater danger and virtually guaranteed that the nature and extent of these activities would become known to the first nation, putting us at life-long risk of retaliation, including the risk of assassination.

6. Believing we had no other choice, my wife and I complied with these new requests. After performing the additional highly dangerous and valuable assignments, we were eventually brought to the United States and provided with new names and false backgrounds. The Agency offered to place us in a what amounted to a retirement statues, with financial and health benefits. We responded that we would rather integrate into American society and become gainfully employed and productive members of our community. The Agency accepted this and again promised lifetime support to the extent that our earnings were insufficient. The Agency repeatedly promised to provide a "safety net" for us for life, stating that this was required by law.

7. Upon entering the United States, we spent approximately eight months in an Agency safehouse being debriefed by various persons who we understood to be Agency or other government officials. During this time and for a period thereafter, defendants provided us

assistance in the form of education and medical benefits and a modest monetary living stipend. The educational benefits were intended to form the basis of a new identity and "cover" life in the United States and were different from the substantial education and professional experience we had from our former lives. The financial stipend provided by the Agency was not what was promised but it was enough to begin a new life and we accepted this without complaint. As soon as permitted by law, and prior to the termination of benefits by defendants in February 1997, we became citizens of the United States.

8. Using a false name and false resume, and with the Agency's assistance and guidance, I eventually obtained professional employment in 1987. At this time, I was in my late 40s. The initial position was as an apprentice and was probationary.

9. As my salary increased over time, the Agency living stipend decreased and eventually was discontinued. The Agency's financial stipend was initially $20,000 per year, plus paid housing and health care costs. In addition, I was paid for debriefing session. After we left the safehouse, the stipend increased to $25,000 per year, plus health insurance premiums and health care costs. After I became fully employed, the stipend increased to $27,000. During the latter several years of the stipend, the total of the stipend and my earnings equaled $27,000.

10. Attached hereto as Exhibit 1 is a copy of a card hand written on 8/9/89 by the Agency's representative who was my contact in the Seattle area in the 1989 to 1993 time period. This exhibit shows a schedule of

payments to be made by the Agency. For example, for the period April 1, 1992 to April 1, 1993, the Agency was to and in fact did pay my wife and me $3,500 which, together with my salary, brought our total income to $27,000.

11. Attached here as Exhibits 2, 3 and 4 are copies of my W-2 statements for 1991, 1992 and 1993, respectively, received from the putative business that was used to provide a conduit for Agency payments to me. Information relating to the name and identification number of the employer and the name given to me by the Agency and my social security number have been redacted for security reasons.

12. At the time the Agency advised me that the financial stipend would end as my salary reached $27,000 per annum (see Exhibit 1), I asked for the Agency's reassurances that, if my employment were terminated for some reason, the Agency stipend would resume. Agency officials replied yes, with the same assurances other Agency officials had given us previously – namely, the Agency would always "be there" for us and would renew the financial stipend and assist with finding new employment. We relied on the assurances.

13. After a number of years of successfully supporting my wife and me without Agency assistance, in February 1997 I was laid off from my job due to elimination of my position following a corporate merger. This came at a time in my life where my age provided a substantial obstacle to locating new employment. My efforts to find new employment were also limited by my security arrangements with the Agency which limited

me to a certain segment of the employment marketplace, and this segment was in general contraction nationwide. In addition, the Agency's security arrangements required me to continue utilizing the false name and background created by the Agency. To date, my efforts to find new employment have been unsuccessful.

14. In February 1997, in accordance with the procedure prescribed by the Agency for making contact with the Agency, my wife and I wrote our Agency contact providing the details of our situation and asking for assistance. We received no response from the Agency for nearly four months. When a response did come in June 1997, the Agency expressed regret that no funds were available to provide assistance. No other reason was given for not assisting us as they requested.

15. Attached hereto as Exhibit 5 is a true and correct copy of the Agency's June 1997 letter.

16. When further attempts at obtaining Agency assistance failed to produce any results, we sought legal representation.

17. At different times over the years, various Agency representatives told my wife and me that we had "PL-110" status and repeatedly assured us that the Agency was required by law to provide us with financial and other assistance during our lifetime.

18. In addition to the continuation of salary between the layoff notice in February 1997 and April 1997, I received from my former employer a severance payment of approximately $13,000, representing two weeks pay for every year of employment.

19. Despite professional outplacement assistance arranged by my former employer, and my own extensive efforts, I have been unable to obtain new employment. In my opinion, this failure occurred for a number of reasons, including: a) my training and employment experience in the United States is in a very narrow field, and this field is co: racting due to mergers and corporate downsizing; b) I had to live the cover life with a false name and false background constructed by the Agency and which was set forth on the false resume created by the Agency, c) the Agency did not assist, as it had in the past, by talking with the senior management of the potential employer and therein disclose by true circumstances; d) my age (in my mid- to late 50s); and e) my relatively poor health. With respect to subpoint c) above, the Agency told me they would always disclose to senior management my true circumstances in conjunction with any prospective employment.

20. In spite of bleak prospects, I continue to search for suitable employment.

21. My wife and I received Washington State unemployment assistance until November 1997, when benefits ran out.

22. In an effort to reduce our cost of living to a minimum, when the unemployment benefits ran out, we temporarily left the United States to live with one of my aging relatives in a former Eastern Bloc country in near subsistence level conditions. This was an act of desperation, as it greatly increased the risk to our personal security.

23. The risk to our personal security is created by the fact that, due to our former positions before defection and the fact that defendants forced us to conduct

intelligence activities that would clearly fingerprint us as having conducted espionage for the United States prior to defection, the security service of our former country imposed a sanction on us which was either death or life imprisonment for me and substantial prison time for my wife.

24. My wife and I are aware that sanctions by the aforementioned security service for some persons have been lifted following the end of the Cold War, but not for persons who formerly occupied senior positions within the government and who were known to have conducted espionage activities. The continued presence of such sanctions causes my wife and me considerable concern and anxiety.

25. While temporarily living with my relative, I obtained employment as an advisor to the president of a commercial company on matters related to international trade. There was only a minimal salary associated with this position, but it was something and it provided some prospect for improvement. Unfortunately, after serving in this position for several months, I came in direct contact with a former associate known to me to be, at least in the past, an officer of the state security service. In order to eliminate further contact with this individual and the associated threat to our personal security, I immediately terminated my employment with the company.

26. About this same time, my wife was experiencing health problems. I was at the time also suffering medical problems. The local medical facilities were hopelessly inadequate and were unable to treat either my wife's or my medical problems.

27. The combination of the scare occasioned by the recognition of me by the former (or perhaps current) security service agent, the need to obtain competent medical treatment for my wife, and a desire to be able to work more closely with our attorneys who were still trying to obtain relief from the Agency, caused us to return to the United States.

28. Since returning to the United States, we have obtained temporary work for approximately three months. Aside from this income, we have been living by borrowing against our modest retirement savings. This has included the payment of some $4,800 to reinstate our medical insurance and some $6,200 for premiums, co-payments and medicine. I still cannot find regular, professional work and my wife is unable to do any physical work due to her medical condition. This causes us great stress and concern, since our assets will soon be depleted if something does not change.

29. If this Court does not issue a preliminary injunction requiring the defendants to resume financial stipend payments during the pendency of this case, we feel that we must leave the United States immediately and go to an Eastern Bloc country in order to reduce our living expenses and to search for employment where we believe there is more opportunity for us under our circumstances.

30. Both my wife and I have significant concern and anxiety over such a move in that we will greatly increase the odds of coming in contact with security service agents who are aware of the sanction against us. Whether such sanction would be imposed or simply the

threat of imposition used for blackmail is immaterial – both cause great concern.

31. Both my wife and I will suffer by the low level of medical services that are available at our intended destination.

32. My wife and I suffer great stress as a result of our uncertain future. Despite our best efforts to work and earn social security benefits, we understand we have qualified for social security benefits of only $845 a month at age 65, and 11 months. Presently, I am in my mid to late 50s, too young to receive the modest social security payments I have earned and too old to do much to change the financial situation, particularly considering the severe constrictions placed on me with regard to potential employment by my secret life, false identity and failing health.

33. Should the Court grant our motion for a preliminary injunction, it would be next to impossible for us to post an injunction bond, other than in a nominal amount.

I CERTIFY UNDER PENALTY OF PERJURY under the laws of the United States of America that the foregoing is true and correct.

SIGNED AND DATED at Seattle, Washington, this 4th day of February, 2000 by JOHN DOE.

/s/ J. Doe
John Doe

PRESENT – 4/01/90	$7000 P/A	
4/01/90 – 4/01/91	6000 P/A	22,500
4/01/91 – 4/01/92	4750 P/A	
4/01/92 – 4/01/93	3500 P/A	27,000

Bob 8/9/89

OMB No. 1545-0008

2 Employer's name, address, and ZIP code * * *		
3 Employer's identification number * * *		
4 Employer's state I.D. number		
5 Employee's social security number * * *		

6
Statutory employment ☐ Deceased ☐ Person part ☐ Legal rep ☐ Bd2 mmp ☐ Successor ☐ Deferred ☐ Void correspondent ☐

7 Allocated tips	8 Advance EIC payment
9 Federal income tax withheld 290.60	10 Wages, tips, other compensation 5166.64
11 Social security tax withheld 320.32	12 Social security wages 5166.64
13 Social security tips	14 Medicare wages and tips 5166.64
15 Medicare tax withheld 74.92	16 Nonqualified plans

17	18 Other
19 Employee's name, address, and ZIP code * * * SEATTLE WA * * *	
20	21
22 Dependent care benefits	23 Benefits included in Box 10
24 State Income tax	25 State wages, tips, etc.
26 Name of state	27 Local income tax
28 Local wages, tips, etc.	29 Name of locality

IRS APP.

Dept. of the Treasury – Internal Revenue Service

Copy 2 To Be Filed With Employee's State, City, or Local Income Tax Return

Form W-2 Wage and Tax Statement 1991

Employee's and employer's copy compared ☐

OMB No. 1545-0008		
2 Employer's name, address, and ZIP code * * *		
3 Employer's identification number * * *		

4 Employer's state I.D. number		
5 Employee's social security number * * *		
6 Statutory employment ☐ Deceased ☐ Person part ☐ Legal rep ☐ Bd2 mmp ☐ Successor ☐ Deferred correspondent ☐ Void ☐		
7 Allocated tips	8 Advance EIC payment	
9 Federal income tax withheld 67.60	10 Wages, tips, other compensation 3916.68	
11 Social security tax withheld 242.80	12 Social security wages 3916.68	
13 Social security tips	14 Medicare wages and tips 3916.68	
15 Medicare tax withheld 56.80	16 Nonqualified plans	
17 See Instrs. for Box 17	18 Other	
19 Employee's name, address, and ZIP code * * * SEATTLE WA * * *		
20	21	
22 Dependent care benefits	23 Benefits included in Box 10	
24 State Income tax	25 State wages, tips, etc.	
26 Name of state	27 Local income tax	

28 Local wages, tips, etc.	29 Name of locality	

IRS APP.
Dept. of the Treasury – Internal Revenue Service

Copy C For EMPLOYEE'S RECORDS (See Notice on back.)

Form W-2 Wage and Tax Statement 1992

This information is being furnished to the Internal Revenue Service. If you are required to file a tax return, a negligence penalty or other [illegible] may be imposed on you if this income is taxable and you fail to report it.

---

a Control number		Void ☐	OMB No. 1545-0008	
b Employer's identification number * * *				
c Employer's name, address, and ZIP code * * *				
d Employee's social security number * * *				
e Employee's name, address, and ZIP code * * * SEATTLE WA				
1 Wages, tips, other compensation 1166.68		2 Federal income tax withheld 0.00		
3 Social security wages 1166.68		4 Social security tax withheld 72.32		

5 Medicare wages and tips 1166.68	6 Medicare tax withheld 18.92
7 Social security tax	8 Allocated tips
9 Advance EIC payment	10 Dependent care benefits
11 Nonqualified plans	12 Benefits included in Box 1
13 See instrs. for Box 13	14 Other

15
Statutory employment ☐ Deceased ☐ Person part ☐ Legal rep. ☐ 942 wmp. ☐ Subtotal ☐ Deferred compensation ☐

16 State Employer's state I.D. No.	17 State wages, tips, etc.
18 State income tax	19 Locality names
20 Local wages, tips, etc.	21 Local income tax

IRS APP.
Dept. of the Treasury – Internal Revenue Service

Form W-2 Wage and Tax Statement 1993

Copy C For EMPLOYEE'S RECORDS (See Notice on back.)

This information is being furnished to the Internal Revenue Service. If you are required to file a tax return, a negligence penalty or other sanction may be imposed on you if this income is taxable and you fail to report it.

---

5 June 1997

Dear * * *

Thank you for your letter and resume. We are very sorry that it has taken this long to respond to your telephone calls and letter, but we have been in a state of transition and have been unable to give your problem our fullest attention until recently. We were very sorry to learn that you were laid off from your position at the bank. Please be assured that we have carefully reviewed the information you submitted along with your contract with this organization and the benefits contained therein. As Ms Catney stated in your previous discussions, we sympathize with the situation you now find yourself in but regret that due to our budget constraints, we are unable to provide you with additional assistance. We have discussed your resume with an employment specialist who has suggested a job search company in your area. We were advised that this company specializes in finding employment for persons in your field of banking and financing, but we've have no personal experience or other information relating to its success ratio:

Accountants On Call
601 Union St
Two Union Square
Seattle, Wash. 98101

Janeen Reinhart
206-467-0700

We want you to know that this office has great respect for the people we serve and we remain grateful for your past service to this country. We continue to be concerned for your security and welfare and would hope to be flexible should you require assistance in the future.

Again, we wish you and your family every success.

Sincerely,

/s/ Nancy Clayborne
Nancy Clayborne

The Honorable Robert L. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN DOE and JANE DOE, husband and wife, Plaintiffs, vs. GEORGE J. TENET, Individually and as Director of Central Intelligence and Director of the Central Intelligence Agency, and THE UNITED STATES OF AMERICA, Defendants.	NO. C99-1597L DECLARATION OF STEVEN W. HALE

STEVEN W. HALE states as follows:

1. I am one of the attorneys of record for the plaintiffs, John Doe and Jane Doe, know the contents of this declaration to be true and am otherwise competent to testify thereto.

2. After plaintiffs sought legal representation in their efforts to obtain assistance from the Agency, the Agency granted the me and Elizabeth A. Alaniz security clearance for purposes of representing plaintiffs in their claim with the Agency.

3. During a meeting in August 1997 at which the security clearances were granted, the Agency representative (an attorney from the office of General Counsel)

purported to explain the Agency's unilateral determination that the benefits previously provided were "adequate" for the services rendered and that plaintiffs were entitled to no further benefits. The Agency's attorney did not at this time claim any budgetary problems.

4. During this meeting, the Agency's attorney made statements concerning plaintiffs' services for the United States, the benefits previously provided to plaintiffs, and explained that the Agency's decision on benefits was based on an after-the-fact subjective evaluation of the services performed. The statements by the Agency attorney relating to services rendered was incomplete, misleading and substantially understated plaintiffs' services as compared with the description provided to us by plaintiffs. The Agency's representative was unable to reply to questions we posed because, as she said, she "was just a messenger" and had no substantive knowledge of the facts. We, therefore, requested an opportunity to meet with Agency persons who were (a) substantively knowledgeable and (b) empowered to make decisions. This request was denied. Instead, the Agency advised that plaintiffs could appeal the decision to the DCI.

5. We prepared an appeal, on behalf of the plaintiffs, to the DCI. In doing so, the following occurred:

(a) We repeatedly requested from the Agency copies of the regulations that governed the appeal process. These requests were ignored and no regulations were ever provided.

(b) We repeatedly requested copies of the PL-110 rules and regulations. These requests were ignored and no rules or regulations were ever provided.

(c) We repeatedly requested access to records potentially relevant to this matter and which were classified within the level of security clearances granted us. These requests were denied or ignored.

(d) We repeatedly requested access to the persons with personal knowledge of the relevant facts. These requests were denied or ignored.

(e) We requested face-to-face meetings with responsible Agency officials, with or without plaintiffs present, to discuss the relevant facts and circumstances. These requests were denied or ignored.

(f) Notwithstanding the considerable obstacles presented by the Agency's aforestated failures to provide even the most basic information, we filed, on behalf of the plaintiffs, their appeal with the DCI on or about December 9, 1997. At the same time, we requested an independent review by the Agency's Inspector General ("IG"). This request and follow-up requests for IG review have not, to my knowledge, resulted in any review by the IG.

(g) Subsequently, counsel for the Agency orally advised us that the Deputy Director of Operations (not the DCI) had denied plaintiffs' appeal. Counsel for the Agency advised that a further appeal was possible to a panel of former Agency officials (referred to as the Helms Panel after its chairperson, former DCI Richard Helms). Being confused about the appeal process as a result of the inconsistent and contradictory oral information provided by the Agency, we again requested copies of the regulations or rules governing such appeals. This request, like all before it, was ignored.

(h) We requested written confirmation of the Agency's determination of the appeal. This request was ignored.

(i) We pursued, on behalf of plaintiffs, an appeal to the Helms Panel and, in doing so, renewed our requests for access to documents and persons and for a copy of regulations governing the appeal process. In addition, we made repeated requests for an opportunity for plaintiffs themselves or, at a minimum, for us to appear before the Helms Panel and present their case. We also made repeated requests for an opportunity to confront witnesses – whose identities could, if necessary, be concealed. These requests were directed both to the Agency and to the Helms Panel. Other than receiving a voice mail message from Mr. Helms, all such requests were either denied or ignored.

(j) Counsel for the Agency subsequently advised me orally that the DCI had determined, based on the recommendation of the Helms Panel, that the Agency should provide certain benefits to plaintiffs for a period not to exceed one year, and nothing thereafter.

(k) I was allowed to read the DCI's written decision at a secure location in the Washington D.C. area. Even though the DCI's decision document did not bear any classification, the Agency refused to provide me with a copy of the document. The DCI's written decision did not state the reasons for rejecting the legal arguments and factual assertions advanced by plaintiffs in their appeal or the evidence relied upon in reaching his decision. In addition to the DCI's decision, I was also allowed to read a document that purported to be minutes of the proceeding before the Helms Panel. The document was very short and general in detail. It reported that three persons involved in the recruitment, handling, and resettlement of plaintiffs presented testimony. The brief summary of their statements, which totaled several sentences, indicated testimony that was incomplete, misleading and substantially understated plaintiffs' services as compared with the facts as related to me by plaintiffs,

other than the fact that one witness reportedly testified that he or she explained to plaintiffs that PL-110 status is a life-long commitment for security.

(l) Counsel for the Agency subsequently advised me that in order for plaintiffs to accept the benefits of the DCI's decision, they would have to execute full and complete waivers and releases. The DCI's decision document itself makes no mention of waivers or releases.

(m) We subsequently wrote counsel for the Agency asking for clarification of whether the appeal process and the DCI's decision represented an adjudication of plaintiffs' rights, and if so, how such an adjudication could be predicated on a demand for a waiver and release. The Agency has not responded.

6. Whenever I attempted to discuss the merits of the dispute with Agency lawyers, the response was one or more of the following:

(a) On several occasions, the call or letter by us requesting a meeting or discussion was ignored without even the courtesy of a response;

(b) On the few occasions when a dialogue resulted, never was the Agency lawyer willing or able to discuss the merits, notwithstanding the fact that Ms. Alaniz and I had been granted security clearances; or

(c) When we pointed out a failure of the Agency to consider the merits of the dispute according to accepted legal principles and indicated a willingness to go to court if the Agency did not respond appropriately, the Agency lawyer's response was "how are you going to get around *Totten*?

7. The reason for the Agency's unwillingness to discuss the merits of the case with us, notwithstanding the

fact that the Agency had granted us security clearances specifically for the purpose of representing plaintiffs in this matter, was never explained by the Agency.

8. Attached hereto as Exhibit 1 is a true and correct copy of the Report on the Hearings on Federal Government's Handling of Soviet and Communist Bloc Defectors, Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, October 1987.

9. In one of the documents shown to me by the Agency, a document that bore no security classification, the Agency stated that it designated plaintiffs as having "PL-110" status. To the best of my recollection, this document was a response to a staff member of the U.S. Senate. Aside from admitting the plaintiffs' PL-110 status, the summary of plaintiffs' work for the Agency in this document was, when compared with what has been related to us by plaintiffs, incomplete, misleading and substantially understated plaintiffs' services.

10. Attached hereto as Exhibit 2 is a true and correct copy of a letter we received from the Central Intelligence Agency approving plaintiffs' complaint for public filing.

I CERTIFY UNDER PENALTY OF PERJURY under the laws of the United States of America that the foregoing is true and correct.

SIGNED AND DATED at Seattle, Washington, this 4th day of February, 2000 by STEVEN W. HALE.

/s/ Steven W. Hale
Steven W. Hale

FEDERAL GOVERNMENT'S HANDLING OF SOVIET AND COMMUNIST BLOC DEFECTORS

HEARINGS

BEFORE THE

PERMANENT
SUBCOMMITTEE ON INVESTIGATIONS

OF THE

COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

OCTOBER 8, 9, 21, 1987

FEDERAL GOVERNMENT'S HANDLING OF SOVIET AND COMMUNIST BLOC DEFECTORS

THURSDAY, OCTOBER 8, 1987

U.S. SENATE,
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The subcommittee met at 9:33 a.m. in room SD-342, under authority of S. Res. 80, Section 13, dated January 28, 1987, Hon. Sam Nunn, chairman of the subcommittee, presiding.

Members of the subcommittee present: Senator Sam Nunn, Democrat, Georgia; Senator Jim Sasser, Democrat,

Tennessee; Senator William V. Roth, Jr., Republican, Delaware; and Senator William S. Cohen, Republican, Maine.

Members of the professional staff present: Eleanore J. Hill, Chief Counsel and Staff Director; John F. Sopko, Deputy Chief Counsel; Mary D. Robertson, Chief Clerk; Kathleen A. Dias, Executive Assistant to the Chief Counsel; David B. Buckley, Investigator; Cynthia Comstock, Staff Assistant; David Munson, Investigator; Harriet J. McFaul, Counsel; Harold Lippman, Investigator; Daniel F. Rinzel, Chief Counsel to the Minority; Mary K. Vinson, Staff Investigator to the Minority; Marilyn Munson, Secretary; Declan Cashman, Secretary; Evelyn Boyd (Senator Sasser); Rick Goodman (Senator Pryor); Allie Giles (Senator Levin); Natalie Bocock (Senator Cohen); Jeff Landry (Senator Stevens); Lori Beth Feld (Senator Trible); Marianne McGettigan (Senator Rudman); Jim Dykstra (Intelligence Committee); and Richard Dill.

[Senators present at convening of hearing: Senators Nunn and Cohen.]

[The letter of authority follows:]

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,
Washington, DC.

Pursuant to Rule 5 of the Rules of Procedure of the Senate Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, permission is herby granted for the Chairman, or any Member of the Subcommittee as designated by the Chairman, to conduct open and/or executive session hearings without a quorum of two members for the administration of oaths and the taking of

testimony in connection with hearings on the Federal Government's Handling of Soviet and Communist Bloc Defectors, to be held on October 8, 9 and 21, 1987.

SAM NUNN,
Chairman,
WILLIAM V. ROTH, JR.,
Ranking Minority Member.

* * *

Donald Jameson retired from a distinguished career at the CIA, where he became an expert on the subject of defectors and defection. Lt. Gen. James Williams retired recently as Director of the Defense Intelligence Agency, a position in which he had direct experience with the value of the defector to military intelligence.

I think that it might be useful at the outset to define a few terms. At Jamestown, when we use the word "defector," we mean an individual who has illegally removed himself or herself from jurisdiction of a Communist government. We do not as a rule work with emigres who have left their former countries legally.

When we use the term "high level," we mean someone whose position and experience in his former country was such that he is qualified to make a sustained contribution to Western understanding of the East.

Senator NUNN, Mr. Geimer, unfortunately, we have a vote up there. I would like to hear your testimony, and we don't have anybody else here. This is a strange time to take a break, but we are going to have to take about a five-minute break. I will run and vote, and come back as soon as possible. I think that it will be better than going all the way through it. I will be back in about five minutes.

[Recess.]

Senator NUNN. Mr. Geimer, why don't you proceed right where you left off.

MR. GEIMER. I was explaining that Jamestown represents high level defectors. I was saying that when we say high level, we mean someone whose position and experience in his former country was such that he is qualified to make a sustained contribution to Western understanding of the East. Admittedly, applying this label entails a certain amount of subjectivity.

Within the category of "defector," we distinguish four groups. First, there are the people with relatively little education and who occupied relatively low positions in their former country. I refer here to seamen who jump ship, and soldiers who defect in Afghanistan, for example. Jamestown does not work with people of this type because they have little of interest to say beyond the initial press conference.

Second, there are the people from ordinary occupations who have transferable skills. I refer here to hockey players, physicians, engineers, ballerinas, and so forth. Jamestown does not work with people in this category. For the most part these individuals simply want to practice their profession in freedom. They have relatively little trouble adjusting to life in the West, and little interest in participating in the public dialogue on East-West issues.

Third are the intelligence officers. Usually people in this category live quiet lives in the United States. They are given new identities, learn new skills, and live anonymously. This group is believed to be at risk of reprisal from their former governments and, as a result, are not given to public activity.

In most cases, the public and Jamestown would not even know of the existence of an intelligence officer who has defected. There are a few exceptions, however, and Jamestown does work with some former intelligence officers who are willing to write books and to lecture.

The fourth category consists of people who are diplomats, or occupied other high positions in government or in the academics world. These are the people with whom Jamestown works, because we believe it important that the experience and insights of such people be shared as widely as possible in the West. These are the people from whom we can learn the nature and purposes of our adversaries in the East.

Among those whom Jamestown assists, as I mentioned above, are a few former intelligence officers. These are supported by the Federal government under what is commonly referred to as Public Law 110. This law requires the government to support for life individuals who defect and who bring with them important intelligence. However, the vast majority of the people we work with receive no financial assistance. They work for a living just like anyone else.

If an individual is newly defected and requires resettlement assistance, Jamestown will help him find housing, employment, language training, driver's license, or whatever is needed. If an individual is well settled here, Jamestown will provide whatever services are necessary to enable the defector to convey his message to policy-makers and the public.

We may provide editing and translation services for those who are writing articles and books. We may provide training in public speaking for those who have joined

Jamestown's speakers bureau. The one thing that we don't provide, because we don't have enough of it, is money.

Most of the people Jamestown works with could and should work full time speaking, writing, and teaching in the field of international relations. They are, after all, a unique and scarce national resource. However, this resource is not being fully used. Let me cite some examples.

A former Soviet scientist works for the U.S. Government in a capacity unrelated to his education or experience. He should be a full-fledged member of the American academic community, but there are no funds to support his research or to enable him to acquire a degree from an American university.

A former Soviet military officer and university professor makes his living teaching Russian. In our opinion, he should be studying for a U.S. degree so that eventually he can teach in a university here.

A former Soviet diplomat is studying for a graduate degree here, but his studies suffer because he must work nights repairing refrigeration equipment in order to support himself.

A former Cuban diplomat, with a wealth of experience, has just lost his job as an editor because the company he worked for has collapsed. His future is uncertain.

A former ambassador from Ethiopia, a highly educated and cultivated man, is unemployed. For a while he earned a living doing menial work, but found it beyond his physical capacity.

A former high level diplomat from Eastern Europe is nearing the end of a temporary assignment. He would like

to obtain a U.S. graduate degree and pursue a career in teaching, but this is impossible because he needs to support his family.

* * *

unique talents, the negative impact upon future defections, and the propaganda use that the Soviet Bloc makes of these failings. These problems affect not only the number of future non-intelligence defectors but also the critically important defection of the intelligence officer or other essential alien since their treatment is inexorably intertwined to the would-be defector.

III. THE DEFECTOR PHENOMENA

A) Definition: Who Are They?

Unlike "political refugee," "asylee" or "immigrant" that have clear legal definitions and consequences, the term "defector" has been used to cover a wide range of activities and any number of individuals or events. Thus it has been used to describe the 1986 decision of American scientist Arnold Lokshin to move with his family to the USSR[4], the 1960's espionage activities of Col. Penkovsky within the Soviet Union[5], as well as the recent expulsion of known dissidents such as Aleksandr Solzhenitsyn and Yuri Orlov[6].

Congress has provided for selective assistance to a very small number of defectors who are of special interest to the the intelligence community. Section 7 of the *Central Intelligence Act of 1949*, (50 USC 403h), states:

> *Admission of essential aliens; limitation on number*
>
> "Whenever the Director, the Attorney General, and the Commissioner of Immigration shall determine that the entry of a particular alien into

> the United States for permanent residence is *in the interest of national security or essential to the furtherance of the national intelligence mission*, such alien and his immediate family shall be given entry into the United States for permanent residence. . . . Provided, That the number of aliens and members of their immediate families . . . , shall in no case exceed one hundred persons in any fiscal year."

Due to the nature of their mission, these essential aliens are limited to an extremely small number of defectors who for clear national security reasons are afforded the protection and special handling of the Intelligence Community. For the most part, due to their special security problems, these defectors are unable or unwilling to enter the public arena under their real names or identities.[7]

In practice only an exceedingly small number of people fall into this category. The staff found that the bulk of those people one would normally classify as "defectors" have tended to fall outside of this definition, despite the fact that many of them are often privy to important and otherwise unavailable information that would be useful in the public domain for the analysis of Soviet and East European affairs.

Even when this type of defector is eager to contribute his or her knowledge to the analytical community, the staff found

* * *

CENTRAL INTELLIGENCE AGENCY

WASHINGTON, D.C. 20505

Office of General Counsel

13 August 1999

PERSONAL AND CONFIDENTIAL

Steven Hale, Esq.
Perkins Coie
1201 Third Avenue
40th Floor
Seattle, Washington, 98101

Dear Mr. Hale:

We have completed the review of your draft complaint. You may file it as is. Our review was not for the purpose of identifying and removing classified information. Should you elect to file the complaint, the Agency reserves the right to decline to confirm or deny any and all allegations in your complaint when an official confirmation or denial would disclose classified information.

Sincerely

/s/ M. D. Darby
M. Diane Darby
Area Security Officer

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN DOE and JANE DOE, husband and wife, Plaintiffs, vs. GEORGE J. TENET, Individually and as Director of Central Intelligence and Director of the Central Intelligence Agency, and THE UNITED STATES OF AMERICA, Defendants.	NO. C99-1597L PLAINTIFFS' MOTION TO STRIKE PORTIONS OF WILLIAM H. McNAIR'S DECLARATION **NOTE ON CALENDAR TO BE HEARD WITH DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, RENEWED MOTION TO DISMISS NOTED FOR OCTOBER 13, 2000.**

I. MOTION

Plaintiffs John Doe and Jane Doe respectfully move the Court for an order striking the following portion of the declaration of William H. McNair ("McNair") dated July 17, 2000:

> I can inform the court unequivocally that there are *no* Agency or other US federal regulations that require the CIA to provide lifetime subsistence assistance to individuals brought into the United States under the authority of PL-110. **Neither PL-110, nor any other law, statute, regulation, internal policy, unstated principle or anything else has ever before, or does now, obligate the Agency to provide**

any form of lifetime financial assistance to individuals brought into the United States by the CIA under the authority of PL-110.

McNair declaration at 3-4, ¶ 5 (emphasis in original).

II. ARGUMENT

Defendants have moved for summary judgment or, in the alternative, to dismiss the pending action. In support of their motion, defendants filed a declaration from William H. McNair, the Information Review Officer for the clandestine service of the CIA (the Directorate of Operations). The identified portion of the McNair declaration referenced above should be stricken because 1) when deposed, Mr. McNair was unable to identify which portions of the declaration were based on his personal knowledge as opposed to that of others; 2) Mr. McNair has no responsibility or specialized expertise in either making or interpreting such regulations and thus his opinions are unqualified and lack foundation; 3) Mr. McNair's characterizations and opinions as to what the regulations provide constitute legal conclusions; and 4) they are hearsay.

Statements in declarations and other evidence must be stricken or ignored if they constitute hearsay, legal conclusions, inadmissible opinions, or otherwise are incompetent or inadmissible. Fed. R. Civ. P. 56(e) requires that such declarations be made on personal knowledge of such specific facts as would be admissible in evidence, and affirmatively shown by an affiant competent to testify to those specific facts.

A. Mr. McNair is Not Competent to Testify On the Matters Addressed in the Portion of His Declaration that Plaintiffs Seek to Strike

1. Defendants have not established that the subject testimony is based on Mr. McNair's personal knowledge.

In his deposition testimony, Mr. McNair admitted that the CIA's attorneys drafted his declaration, that the declaration was basically boilerplate, and that he could not determine which parts of the declaration are based on something other than his personal knowledge:

> Q: Now with regard to the declaration, did they [CIA lawyers] draft it first or did you draft it?
>
> A: They work actually off of – I don't want to say boilerplate, but we know what the issues are, and then it will come to me maybe twice in draft.
>
> Q: If I wanted to ask you what part in this declaration was in part at least based upon something other than your personal knowledge, you couldn't point that out?
>
> A: Frankly, I doubt it because they run together.

Deposition of William H. McNair dated September 7, 2000 at 56 (submitted as Exhibit A to the Declaration of Steven W. Hale, September 25, 2000.) In response to another question about whether he could determine what part of the declaration was based on something other than his personal knowledge, Mr. McNair responded, "I don't think I could parse that out." McNair Dep. Trans. at 54. The subject testimony must be stricken pursuant to Fed. R. Evid. 602.

2. Mr. McNair Is Not Qualified to Render an Opinion About the Meaning of the CIA's Regulations.

Mr. McNair admitted in deposition that he has no responsibility for making or interpreting CIA regulations and that his sole function with regard to the regulations is a security function, that is, in situations where the regulations are to be released to someone without the requisite security clearance, Mr. McNair's function is to ensure that the regulations are released in a redacted form that does not result in the release of information potentially harmful to the national security. McNair Dep. Trans. at 105. Mr. McNair is not expressly offered by defendants as an expert and he obviously is not an expert on the meaning of regulations. Mr. McNair's opinion is also not admissible as lay opinion as they are not "rationally based on the perception of the witness." Fed. R. Evid. 701, 702.

McNair also admitted that he does not know what procedures the CIA used in responding to plaintiffs' grievance. *Id.* at 90. Yet, the portion of his declaration to which the plaintiffs object states that Mr. McNair is familiar with the laws, statutes, regulations and internal policies that govern the financial assistance given to individuals brought into the United States by the CIA. Such a statement is not admissible because Mr. McNair has no personal knowledge of the procedures for responding to plaintiffs' grievance.

3. Mr. McNair's Testimony Constitutes a Legal Opinion Which He is Not Qualified to Offer.

Mr. McNair's opinions about the CIA regulations are legal conclusions which he is not competent to provide. *See*

Fed. R. Civ. P. 56(e); Fed. R. Evid. 701. Mr. McNair's declaration states that "[n]either PL-110, nor any other law, statute, regulation, internal policy, unstated principle or anything else has ever before, or does now, obligate the Agency to provide any form of lifetime financial assistance to individuals brought into the United States by the CIA under the authority of PL-110." McNair declaration at 3-4. Whether the CIA is obligated by law to provide certain assistance to individuals brought into the U.S. by the CIA is a legal question which Mr. McNair is not competent to address. Mr. McNair is an Information Review Officer. It is not his job to interpret laws or CIA regulations. He stated that he does not even know if any regulations exist that would govern the panel that deals with resettlement grievances. McNair Dep. Trans. at 35. Because the subject portion of his declaration provides a legal conclusion about CIA regulations, it must be stricken.

B. Mr. McNair's Opinions Are Hearsay.

The subject portions of Mr. McNair's declaration is hearsay and is not admissible under any recognized exception to the hearsay rule. Fed. R. Evid. 801, 802.

III. CONCLUSION

For the forgoing reasons, plaintiffs request that the indicated portion of Mr. McNair's declaration be stricken.

DATED this 3rd day of October, 2000.

PERKINS COI LLP

By /s/ Steven W. Hale
Steven W. Hale, WSBA #5993

By /s/ Elizabeth A. Alaniz
Elizabeth A. Alaniz, WSBA #21096
ATTORNEYS FOR PLAINTIFFS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE; et al., Plaintiffs-Appellees v. GEORGE J. TENET, individually and as Director of Central Intelligence and Director of the Central Intelligence Agency; et al., Defendants-Appellants	No. 01-35419 DC# CV-99-1597-RSL Western Washington (Seattle) ORDER (Filed Aug. 6, 2001)

Appellees' motion to expedite this appeal is granted. The provisions of Ninth Circuit Rule 31-2.2(a) shall not apply to this briefing schedule.

Appellants' opening brief is due 30 days from the filing date of this order; appellees' answering brief is due within 28 days after service of the opening brief; and appellants' optional reply brief is due within 14 days after service of the answering brief.

Appellants shall monitor the issuance of the certificate of record. *See* Fed. R. App. P. 11(a); 9th Cir. R. 11-2. Absence of the certificate of record may delay the resolution of this appeal.

The Clerk shall calendar this case on the next available calendar following receipt of appellees' brief.

For the Court

/s/ Martin Lewallen
Martin Lewallen
Motions Attorney/Deputy Clerk
9th Cir. R. 27-7
General Orders/Appendix A

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

Office of General Counsel

1 September 2000

VIA FACSIMILE
Steven W. Hale, Esq.
Perkins Coie, LLP
1201 Third Avenue
Suite 4800
Seattle, Washington 98101-3099

Re: *Doe v. Tenet, et al.*
(US Dist. Ct. Case No. C99-1597L)

Dear Mr. Hale:

Enclosed are Defendant's production in response to Plaintiff's First Requests for Production to Defendants and pursuant to the agreement you reached with Assistant United States Attorney Harold Malkin.

As Mr. Malkin informed you, Defendant objects to the Requests for Production on the ground that information contained in documents responsive to the request is classified pursuant to Executive Order 12958, 3 C.F.R. 333 (1995), *reprinted as amended* in 50 U.S.C.A. § 435 note (1995); and also privileged pursuant to the Director of Central Intelligence's statutory mandate to protect intelligence sources and methods. Section 103(c)(6) of the National Security Act of 1947, *as amended*, codified at 50 U.S.C. § 403-3(c)(6); and also privileged under the Central Intelligence Agency Act of 1949, *as amended*, 50 U.S.C. § 403g. Defendant further objects to the Requests on the ground that they are overbroad and not reasonably calculated to lead to the discovery of admissible evidence as they would request information contained in responsive

documents that would be outside the relevant subject matter of this litigation.

Without waiving these objections, Defendant responds to the Requests by producing the attached documents in a redacted form. Please note that no responsive documents have been withheld, and that all relevant portions of responsive documents have been provided, albeit in a redacted form. William McNair, whose deposition is set for 7 September 2000, is the person responsible for these redactions.

I look forward to meeting with you on September 7 for Mr. McNair's deposition.

Sincerely,

/s/ Daniel L. Pines
Daniel L. Pines
Attorney-Advisor

Enclosures:
as stated

cc: Harold Malkin, Esq.
(via facsimile; with enclosures)

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

General Counsel **OGC-88-53371**
12 December 1988

Stephen A. Saltzburg
U.S. Department of Justice
Office of Assistant Attorney
General
Criminal Division
Room 2113
10th and Pennsylvania Ave., N.W.
Washington, D.C. 20530

Dear Steve:

I am writing to request your assistance in revising certain understandings made in a 1949 letter to the Attorney General by then DCI Admiral Hillenkoetter concerning CIA commitments to those aliens permitted entry into the United States under the provisions of 50 U.S.C.A. 403h. In that letter, Admiral Hillenkoetter assured DOJ that * * * "shall not become a public charge prior to his obtaining United States citizenship." At the time of this original commitment, we believed that * * * would seek American citizenship at the earliest possible moment when they first became eligible for naturalization. Unfortunately, our experience over the years indicates that this 1949 commitment can act as an impediment and financial disincentive to some * * * obtaining U.S. citizenship. It is, of course, the desire of the CIA to encourage * * * to become totally integrated into the American way of life. Such a goal is furthered, we believe, when * * * acquires U.S. Citizenship.

Certainly, the CIA believes it has an obligation to support each of its * * * for a reasonable period of time

and, in some cases, based upon unique circumstances such as illness, age, or indigency, this commitment may be for life. The CIA firmly believes, however, that such a decision should be made by the CIA based upon the merits of each case, and should not be controlled by * * * unwillingness to pursue either available job opportunities or U.S. citizenship. Unfortunately, under the provisions of the 1949 commitment, * * * is able to blackmail the CIA by refusing to become a U.S. citizen, thus requiring the CIA to support him for an indefinite period of time.

The CIA has found that, prior to obtaining U.S. citizenship, many * * * will ask if acquiring American citizenship will affect CIA responsibilities to them. It is the policy of the CIA to answer such questions truthfully. The CIA believes that financial considerations should have absolutely no bearing upon whether * * * decides to become a citizen. It is for these reasons that the CIA requests a revision of the 1949 understanding.

The CIA, therefore, proposes that its obligation to * * * be changed as follows:

> "The CIA will ensure that * * * shall not become a public charge prior to the time he or she becomes a U.S. citizen, or for two years following the time he or she is eligible to obtain U.S. citizenship, whichever occurs first."

Because the majority of * * * have been Communist Party members, * * * in such cases may not be eligible to apply for citizenship for a period of 10 years. To cover court and other potential delays in the processing of * * * citizenship application, it seems reasonable to continue this financial commitment for an additional two years.

CIA concerns with the 1949 commitment are not caused by monetary considerations. The amount required to keep * * * off the public welfare rolls is generally far below what is spent on those we determine to support. The foremost objective of the CIA is to resettle the * * * and to enable the * * * to become a productive member of American society. It is the belief of the CIA that this new proposal is in full compliance with the spirit of the original commitment and will more than meet any obligations the CIA has to its * * * .

It is my understanding that this proposal has been discussed with appropriate members of the Immigration and Naturalization Service and that they have no objections to the proposed change.

Your consideration of the above issues is appreciated. Either I or * * * of my office (40340) is available to discuss this matter further.

Sincerely,

* * *

Russell J. Bruemmer

* * *

The Honorable
The Attorney General
Department of Justice
Washington 25, D.C.

Sep. 8, 1949

Dear Mr. Attorney General:

Reference is made to our previous letter to the Attorney General, dated 1 August 1949, concerning Section 8 of the Central Intelligence Act of 1949. Pursuant to that letter, discussions have been held between representatives of your office and the Immigration and Naturalization Service, and representatives of this Agency. In addition, there is now in process a specific request for motion under Section 8 of the above-mentioned Act.

In the discussions held, it was deemed necessary that additional precautions be set up in the procedure for handling cases of this type. Consequently, I wish to assure you that, in any case in which CIA recommends that an alien be permitted to enter the United States under the provisions of Section 8, *** this Agency will be in a position to inform you as to his whereabouts and activities at all times whether the alien is in the United States or abroad. Further, we shall advise the Immigration and Naturalization Service of such an alien's location while in the United States, and any change in residence or employment will be reported immediately. Also, when such an alien departs from the United States, we shall advise the Immigration and Naturalization Service.

In the event an alien is permitted to enter under the aforementioned Section ***, we guarantee that he shall not become a public charge prior to his attaining U.S. citizenship. In such cases we propose to keep the Immigration

and Naturalization Service informed as to the alien's location until he shall depart from the United States or until he shall acquire United States citizenship. If the proposal that CIA keep Immigration and Naturalization Service informed of the alien's location *** is not satisfactory and if you prefer that the Federal Bureau of Investigation perform this function, we assume you will so notify this Agency.

It should be understood that in carrying out the proposed procedures, this Agency will administer them in its role of a sponsor of the alien. In no case can this Agency exercise physical restraint over an alien or in any way assume internal security functions in view of the provisions of the "National Security Act of 1947" (P.L. 253). In any particular case, and at any time, when derogatory information is received by CIA concerning such an alien, we shall notify you immediately of the information received.

I should like to express my appreciation for the cooperation which my original proposal has evoked in your office. I trust that the above will enable satisfactory procedures to be developed within your office.

Sincerely yours,

/s/ signed
R.H. Hillenkoetter
Rear Admiral, U.S.N.
Director of Central Intelligence

* * *

Dispatched by Special Messenger to Mr. Willard Folly, I&N this date.

Excerpt from relevant regulation –A; item 10.b. date: 07/13/90

Individuals who are accepted * * * and become our Organization's responsibility may be resettled with their immediate families either in our Country or in some third country, insofar as possible that they prefer. * * * Whether in or out of our Country, our Organization assumes certain responsibilities to assist * * * in establishing a normal life and becoming self-supporting. If * * * is resettled in our Country, our Organization's support responsibility normally terminates when he/she acquires citizenship in our Country, but may be terminated earlier.

Excerpt from relevant regulation –A; item 10.a. date: 06/25/99

Our Organization assumes certain responsibilities to assist * * * in establishing a normal life and becoming self-supporting. If * * * is resettled in our Country, our Organization's support responsibility normally terminates when he/she becomes eligible for citizenship in our Country, but may be terminated earlier. This responsibility is limited to individuals and their immediate families who are formally accepted for resettlement assistance. It does not include applicants who lack the "special value" required for status under * * * even though they may be resettled in our Country with our Government's assistance. * * *

Excerpt from relevant regulation –A; item 7, b: date: 01/15/81

Individuals who are accepted * * * and who thus become a * * * responsibility, may with their immediate families be resettled either in our country or in some third country, insofar as possible in the country they prefer. * * * Whether in or out of our country, * * * assumes certain responsibilities to assist the * * * in establishing a normal life and becoming self-supportive. If * * * is resettled in our country, * * * support responsibility normally terminates when * * * has acquired citizenship in our country, but may be terminated earlier if * * * is self-supporting.

Excerpt from relevant regulation –B; item 2,d, (5). date: 01/04/99

It is CIA policy to ensure that a recipient of Section 7 benefits will not become a public charge prior to becoming eligible for U.S. citizenship. CIA may, however, continue to provide financial support to * * * who has been resettled * * * even after * * * has obtained citizenship if * * * determines, in consultation with OGC, that such support is operationally warranted under the totality of the circumstances. The safety and security of * * * are the continuing responsibility of CIA, and expenditures for these purposes, as contrasted to general financial support described above, may be undertaken notwithstanding other limitations described in this regulation.

Excerpt from relevant regulation –B, item c. (4) – (6) date: 06/23/81

As a general rule, CIA financial support for * * * should cease as soon as possible. Likewise, financial support for * * * as a general rule should diminish as soon as possible, particularly after * * * becomes partially self-supporting. CIA has an obligation, however, to ensure that * * * will not become a public charge prior to the time of becoming a citizen or for a period of 10 years of residence in the United States, whichever occurs first. CIA may continue to provide financial support to * * * even after * * * has obtained citizenship or resided in the United States for 10 years, if * * * determines that such support is necessary. The safety and security of * * * are continuing responsibilities of CIA, and expenditures for these purposes, as contrasted to general financial support described above, may be undertaken notwithstanding other limitations described in this regulation.

In any instance in which financial support to * * * has not discontinued after 10 years, the Chief, * * * shall submit to * * * a memorandum recommending either continuation of financial support, termination of such support, or other appropriate action. * * * in coordination with OGC, will approve the continuation or termination of financial support.

No element of CIA shall initiate action to secure passage of a private bill designed to shorten the period of eligibility for citizenship * * * without prior coordination with the Legislative Counsel and the express approval of the DCI.

TRANSCRIPT OF PROCEEDINGS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN DOE AND JANE DOE, Plaintiffs, v. GEORGE J. TENET, et al., Defendants.	Civil Action No. C99-1597L Judge Lasnik

Deposition of WILLIAM H. McNAIR

Pages 1 thru 114 — Washington, D.C.
September 7, 2000

MILLER REPORTING COMPANY, INC.
735 8th Street, S.E.
Washington, D.C. 20003
(202) 546-6666

[1] The deposition of WILLIAM H. McNAIR, called for examination by counsel for Plaintiffs in the above-entitled matter, pursuant to notice, in the offices of Perkins Coie, 607 14th Street, N.W., Washington, D.C., 20005, convened at 10:15 a.m., before Cheryl K. Gerber, a notary public in and for the District of Columbia, when were present on behalf of the parties:

[2] APPEARANCES:

On behalf of the Plaintiffs:

STEVEN W. HALE, ESQ.
Perkins Coie
40th Floor
1201 Third Avenue
Seattle, Washington 98101-3099
(206) 583-8633

On behalf of the Defendants:

DANIEL PINES, ESQ.
Office of General Counsel
Central Intelligence Agency
Washington, D.C. 20505
(703) 874-3146

HAROLD MALKIN, ESQ. (via telephone)
Assistant U.S. Attorney
Suite 5100
601 Union Street
Seattle, Washington 98101
(206) 553-6526

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WITNESS	EXAMINATION BY COUNSEL FOR PLAINTIFFS
WILLIAM H. McNAIR	4

EXHIBITS

McNAIR DEPOSITION EXHIBITS	MARKED
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[4] PROCEEDINGS

MR. HALE: The reporter and the witness and Daniel and myself is the totality here, Harold.

MR. MALKIN: I'm fine.

MR. HALE: Good.

Could you swear the witness, please.

MR. MALKIN: Can I just say, Mr. McNair, you and I have never met. Hello.

MR. McNAIR: Hello there.

MR. MALKIN: Okay, Steve. I'm ready, and you'll put something on the record about the need for us to caucus if that arises?

MR. HALE: Yep.

Whereupon,

WILLIAM H. McNAIR

was called for examination by counsel for Plaintiffs and, after having been duly sworn by the notary public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR PLAINTIFFS

BY MR. HALE:

[5] Q. Would you state your full name, please.

A. William Hayes McNair.

Q. And your position with the Central Intelligence Agency?

A. I'm the Information Review Officer for the Director of Operations for CIA.

MR. HALE: Before we get started, Mr. Malkin and I have agreed that if there's any need to confer with counsel since he's appearing by telephone – and of course, Mr. Pines is here also – that you will let me know, one of you, and the reporter and I will be pleased to step out of the room to allow you to caucus privately.

So if there's any question, just ask for a break, and we'll take that break. Okay.

Harold is that okay?

MR. MALKIN: That's fine with me.

Daniel, is that okay with you?

MR. PINES: That's fine with me as well.

MR. MALKIN: Thanks.

BY MR. HALE:

Q. Before we get started substantively, [6] Mr. McNair, I just want to make sure that we have a common understanding. I'm going to try to ask you questions that do not require you to –

MR. PINES: Divulge?

BY MR. HALE:

Q. – divulge classified information in response. If I fail, I'm sure you'll point it out.

But I want to make sure that we agree that if I do ask you such a question that you will either object or answer fully and will not, for example, give an incomplete answer

or maybe even an evasive answer to protect intelligence sources and methods.

In other words, I want you to give me a full answer or say you can't answer rather than protecting intelligence sources and methods by an incomplete answer. Do you understand what I mean? Is that acceptable to you?

A. Yes.

Q. I thought it would be. I just wanted to make sure that we were on common footing there.

[7] MR. MALKIN: I guess, you know, my understanding of these issues is probably less than anyone else's there. But I think you can't be a little pregnant on if something is classified or it's not.

If you do get into something that Daniel and Mr. McNair feels is problematic, I think our preference would probably be that we simply stand on the objection that it deals with classified material.

MR. HALE: And I fully agree, Harold. The only reason I put that on the record because in the past in other proceedings at other times people affiliated with the government have not divulged certain information because they in good faith believe they were protecting intelligence sources and methods as the law requires.

But they didn't state an objection. They just didn't answer fully or they evaded it, and I wanted to make that none of us in this room were going to follow that procedure.

MR. MALKIN: Well, I think I understand [8] that, Mr. McNair. If you do, then we've got common ground rules.

THE WITNESS: Right. I will either tell you that we're wondering into a classified area or I'll give you a glow mar.

BY MR. HALE:

Q. A glow mar?

A. Neither confirm nor deny.

Q. Thank you very much. Let's see how far we can go.

Have you had your deposition taken before, sir?

A. Yes.

Q. So you're familiar that this is under oath as if you were in the courtroom?

A. Yes.

Q. And that if you don't understand any question that I ask that you can feel free to ask me to repeat it?

A. Yes.

Q. In that regard, if I ask your cooperation if there's a way I can modify my question slightly [9] that will allow you to answer as opposed to interposing an objection, I certainly have no – in fact, I would appreciate your assistance in that regard because our purpose is to get what we can, and what we can't, we can't for now anyway.

Have you ever given a classified deposition by any chance?

A. Yes, a number of times.

Q. How did that work?

A. Well, with a cleared attorney, a cleared transcriber, and we just went through and did it.

Q. What kind of proceeding was that in? Was that court proceeding or an administrative proceeding?

A. I've done them in a court proceeding and some administrative proceedings, but generally in court.

Q. And does that usually happen in a facility where the room is secure also?

A. Yes.

Q. Is that an agency facility or Department of Justice?

[10] A. No. It can be anyplace that's been secured.

Q. About how many times have you done that, sir?

A. In a cleared facility?

Q. Yes.

A. Excess of 20.

Q. A few questions, please, just about your background, the usual thing. Can you tell us your formal education after high school?

A. I have a bachelor's degree from political science from Seaton Hall. I have two years of law school.

Q. And where did you attend the two years of law?

A. Emery University.

Q. And that was in what years?

A. Back in the dark ages, 1960/61.

Q. In your declaration, you indicate that prior to 1982, going all the way back to 1962 if I remember, you were with a government intelligence agency. Can you tell me which one or ones?

[11] A. Yes. I was in the U.S. Army.

Q. And that was military intelligence?

A. Correct.

Q. Can you tell the substance of your duties while you were on a 20-year stint with the Army?

A. I was a case officer with the Army, and then went with the agency and continued in the same field.

Q. And case officer, I think I know what you mean, but I'm not sure the record will be quite clear. Can you just explain what a case officer is?

A. An operations officer is one who collects protected information and to provide to U.S. policy makers.

Q. That collection effort is generally most often with what we call human sources, dealing with other people?

A. Yes.

Q. Did you hold executive positions in the Army in that regard?

A. Yes.

[12] Q. What were those positions?

A. Both – by rank I was a CW-4, and by title I was team chief, a group chief and at one point special advisor.

Q. Can you indicate what area of the world you operated in?

A. I have frankly operated in every area of the country of the world except for the Iceland states.

Q. Was there a focus to your work? Were you Soviet Division or Chinese Division or anything of that nature? Can you say?

A. I'd rather not get into that.

Q. Did you have anything to do with defectors during your time with the Army?

A. The Army, I'm not going to answer that.

MR. PINES: And when he says he's not going to answer it, we're objecting on national security grounds.

MR. HALE: Did you hear that, Harold?

MR. MALKIN: I did.

MR. HALE: That's fine. So we'll just [13] have a standing – an understanding that when the witness refuses to answer he's doing so on national security grounds.

MR. MALKIN: Unless otherwise specified.

MR. HALE: Okay, fine.

BY MR. HALE:

Q. Did you have anything to do with what's called PL-110 while you were in the Army?

A. No.

Q. Were you even aware of what's called PL-110 before you came to CIA?

A. Yes.

Q. How did you become aware of it?

A. I really can't pinpoint the first part, when I first heard of it, but I knew of it in my positions.

Q. So you were generally aware that there was such an authority to bring people in the United States but you weren't involved in that program?

A. Let's leave the answer I knew that there was such a program.

[14] Q. Can I just ask if you had operational responsibilities for that program while you were in the Army?

A. I don't want to answer any questions about operational responsibilities in the Army in that field.

Q. And you came to the CIA in 1982, sir?

A. Yes.

Q. What month was that if you remember?

A. 1 October.

Q. That was directly after retiring from the Army?

A. The next day.

Q. Didn't even take a vacation?

A. No.

Q. What position did you assume when you first came to the agency?

A. I was a case officer.

Q. Can you say in what division?

A. I was an LA body, a Latin American officer.

Q. How long did you stay in that position?

[15] A. 1993.

Q. Did you hold an executive position in the Latin American Division?

A. Yes.

Q. What was that position?

A. I have to object on naming the specific positions.

Q. Were you like a supervisor?

A. Yes.

Q. Can you tell me whether you had anything to do with defectors during the time you were in the Latin American Division?

A. The subject of defectors is really a classified subject.

Q. Let me just ask you to reflect on whether – my question, however, is though in the sense that you have said things about defectors in your declaration. So I would hope that maybe on second push you would be able to just simply say whether you were involved in that in any way.

You say in your declaration that the agency is involved in defectors. We'll get to [16] that in a minute.

MR. PINES: I actually don't believe that's correct.

THE WITNESS: I don't think that's correct either.

BY MR. HALE:

Q. Well, we'll get to that in a minute. I'm going to mark this eventually, but I think in – in Paragraph 1 that you say, (reading):

> "The Directorate of Operations is the CIA's Clandestine Service, and is responsible for, among other things: Conducting foreign intelligence and counterintelligence activities through various means, including human resources; conducting covert action" et cetera.

And then later on you talk about in paragraph 2 your responsibilities for reviewing information related to defectors.

So I think taking those two statements together you've been able to say that the agency's business does involve defectors; is that a fair [17] statement?

Mr. Pines is shaking his head.

A. No, sir. The subject of defectors is a classified subject.

MR. MALKIN: Steve, if the answer to the question concerning Mr. McNair's – the parameter of his responsibilities is an important one to you, then maybe we should take a moment to discuss it amongst ourselves.

But before we do, if you want to do that, it might be useful for us to know whether if he's able to answer that

question about what his particular responsibilities included, vis-a-vis defectors, whether you would tend to go beyond that or whether you would be prepared at that point to move on to another subject, understanding that the subject of defectors is understandably a sensitive and classified one.

MR. HALE: Harold, I appreciate that constructive comment, and I think I will step out and let you talk. I do not have many questions of depth in that area. I'm just trying to establish [18] the foundation for his opinions, and his involvement with PL-110 or his involvement with defectors seem to be relevant to that. I don't really intend to ask much specific about it.

MR. MALKIN: Well, then maybe we should take a moment.

MR. HALE: Okay. I'll step out. We'll go off the record.

(Off the record.)

MR. HALE: We're back on the record.

MR. MALKIN: Steve, let me see if I can't just advance the ball here.

MR. HALE: Good.

MR. MALKIN: I am informed, and certainly have no reason to doubt, that the term "defector" is a classified term. But I think that we can satisfy your curiosity by rephrasing your question slightly and then answering it.

So let us try to do that, and let me ask either Daniel or Mr. McNair to rephrase the question and then respond to it and see if the answer is acceptable to you.

[19] MR. HALE: Okay. Thanks.

MR. PINES: And let me just expand on that just a little bit. The term itself I wouldn't say would be classified. I'd sort of state it in a different sphere.

The agency's relationship or nonrelationship to defectors, as that term is used and as it's a term of art, is classified, whether we do or do not have relationship.

So our problem is with that term. I think Bill had a suggestion of a phraseology that would work.

THE WITNESS: You know, if we want to talk about people from a foreign country who are brought or who arrive in the U.S. for resettlement, then that's acceptable or resettlees. It's the word "defector" itself that is the flag.

BY MR. HALE:

Q. Good. I appreciate that. Let me try that.

During your time in the Army, did you [20] work with persons who became resettlees from foreign nations into the United States?

A. I was involved in people who aspired to be and some who were resettled in the U.S.

Q. In doing that, were you involved at all in making arrangements for that resettlement?

A. I was part of the arrangements, yes.

Q. Were any of those arrangements done under what's called PL-110?

A. Yes.

Q. Did you make those resettlement arrangements while you were in the Army under Army regulations?

A. No.

Q. Army guidelines or policy?

A. Not that I recall. That is really a community effort.

Q. And when you worked in the Latin American Division of the CIA, were you involved in resettlees from foreign countries coming to the United States?

A. While I was a LA officer, I was involved [21] in people who aspired to be resettled and some who were resettled.

Q. And the ones that were resettled, were you involved in making the arrangements for that resettlement?

A. Yes.

Q. Can you tell me what role you played generally in that resettlement effort?

A. I was the one who brought those who aspired to be into a discussion point.

Q. And then that was turned over to someone else?

A. Eventually.

Q. Yes. Were you ever involved during your time as a Latin American officer of the CIA in determining what level of benefits resettlees would have in the United States once they came here?

A. Only a very peripheral – that's a much higher-level decision.

Q. Who, if you can say generically, would make the decisions about the resettlement [22] benefits?

A. Headquarters, the E-MOR-FUS (phonetic) them.

Q. Is it fair to say you were a field officer and you would come into contact with persons who aspired to be resettlees, and some did, and the ones that did were eventually turned over to higher authorities to deal with, and you dropped out of the picture?

A. The decision is always out of the case officer's hand.

Q. And it comes from Headquarters?

A. Yes.

Q. Were you ever involved in making any representations to potential resettlees as to what level of benefits they would receive after you were advised of that level of benefits by Headquarters?

A. I'm hesitating because I'm trying to think of the circumstances. I have engaged in discussions of what could be possible.

Q. I see. And those were based upon [23] advise –

A. Instructions.

Q. – you received – instructions from Headquarters?

A. Yes.

Q. Can you tell me generally the level of authority from Headquarters that was involved in such instructions?

MR. PINES: What do you mean by "level"?

BY MR. HALE:

Q. I mean did the DDO give you those instructions?

A. At a minimum.

Q. So we're clear on DDO, Deputy Director for Operations.

A. Yes.

Q. So it would either be that person or the only people above him would be the director or the deputy director?

A. Correct.

Q. So when a potential resettlee was told what would be available for benefits, it came from [24] either the DDO, the Deputy Director of Central Intelligence or the Director of Central Intelligence.

A. To the best of my knowledge, yes.

Q. And to whom do you currently report by title if you can tell me that, not necessarily by name?

A. I am a Special Assistant to the Chief of Information Management Staff, and I report directly to the DDO himself.

Q. What is your current grade if I may ask you, sir?

A. I'm a GS-15.

Q. Did I ask you – I don't recall if I did – what executive positions you may have held in the Latin American Division?

A. And I said I didn't want to.

Q. Can you say something like branch chief or a division –

A. Yes. I was a branch chief in various places and a senior officer in charge in other places.

[25] Q. I take it you were stationed overseas for part of your time in the Latin American Division?

A. Yes.

Q. When you were overseas, you had a cover identity?

A. Yes

Q. So the record is clear on that, that means you had some name that's not William McNair.

A. In some places.

Q. I asked you earlier if you had been involved in depositions of a classified nature, and you said yes.

Have you also been involved in judicial proceedings, a trial that involved classified information?

A. Yes.

Q. About how many times?

A. I probably do 15 to 20 appearances a year.

Q. Fifteen to twenty a year?

A. Yes.

Q. Is that mostly federal court?

[26] A. Oh, yes. Almost without exception, but some exceptions.

Q. And what type of cases are those mainly?

A. From espionage on.

Q. Criminal prosecutions?

A. Yes.

Q. To civil cases?

A. Some civil cases, generally criminal cases.

Q. Do any of these trials involve you actually giving classified testimony in a closed courtroom that's been cleared?

A. I have appeared in camera, ex parte and under some unusual arrangements made so that the classified information could be presented.

Q. And did any of those involve a trial that was actually in a closed courtroom that had been swept by say the FBI, so you actually had a trial but the whole proceeding was classified and closed to the public?

A. Yes.

Q. How many times have you done that?

[27] A. Probably between 5 and 10.

Q. All right. And did any of those trials involve contract claims with any of the agency suppliers?

A. Not that I recall.

MR. PINES: Can we go back a second to one of your earlier questions?

MR. HALE: Sure.

MR. PINES: I want to make sure that it's clear. You indicated, Bill, that you testified approximately 15 to 20 times per year. Was that in trials or that's in hearings?

THE WITNESS: Appearances in hearings and before a judge or in the trial itself.

BY MR. HALE:

Q. So some of the appearances might not have been at trial but was in front of the judge with opposing counsel present, but they were cleared counsel I take it?

A. Or sometimes without opposing counsel present.

Q. Do you appear in administrative [28] proceedings that are classified, like EEOC proceedings?

A. No. I review all EEOC proceedings, both directions.

Q. And those are classified, are they not?

A. Those are classified.

Q. So that's an administrative trial, but you have not been called to testify in those?

A. I don't think we've ever gone to trial in one frankly.

Q. But there is a procedure for classified trials for EEOC matters; correct?

A. We handle classified reports of investigation and the EEOC determinations similar to INS proceedings. They all come before me.

Q. Do you ever testify in front of an EEOC official about classified information?

A. Never before an EEOC official.

Q. How about an administrative law judge that's acting in the EEOC proceeding?

A. Some administrative law judges and some INS proceedings.

[29] Q. So there are ways in which classified information can be discussed in an adjudicatory manner.

A. Under CIPA there is a well thought out procedure for this.

Q. And you say CIPA, what is that?

A. Classified Information Procedure Act.

Q. The reason I ask in Washington State we have a law called CIPA that relates to environmental shorelines.

A. No.

Q. I didn't think that's what you meant.

May I ask you, please, if there are agency regulations that you are aware of that relate to the selection of persons to participate in resettlement processes?

A. Yes.

Q. The key word in that phrase was "selection," in other words, what you have to do to qualify. Did you understand that?

A. Correct.

Q. Do you know are there agency [30] regulations – and when I say agency, you know I mean CIA; right?

You have to say yes or no.

A. Yes.

Q. Are there agency regulations that you know of that relate to the resettlement of these people who are resettlees from foreign countries?

A. Yes.

Q. And are there agency regulations that deal with the determination of the level and extent of benefits to be given resettlees?

A. Yes.

Q. And are there agency regulations that deal with grievances by resettlees?

A. I say yes – to the best of my knowledge, yes.

Q. You were just a little bit uncertain there. Is it something with my question? Is grievance a bad word?

A. Well, I wasn't – I was trying to include – there are regulations for review of the process.

[31] Q. Of what process?

A. Of the consideration of and the management of these sort of procedures.

Q. Are there regulations that govern any internal review of a resettlees complaint? For example, the resettlees not getting some entitlement to which they think they are entitled?

A. It is my understanding that there is, and I think it's an agency regulation.

I'm including within this there are deal regulations and there are agency regulations. Generally, they are identical perhaps and differ only in a degree so that one, if the agency says you do two steps, the DO regulation would probably say you do three steps.

Q. I see. So there is an agency regulation to your recollection and maybe a DDO regulation, but the DDO regulation would add not subtract from.

A. Correct. You have to do what the agency reg says.

Q. And you may do more at the DDO.

[32] A. You may be told to do more.

Q. So are there, so I understand correctly, agency regulations and DDO regulations that relate to determination of benefit levels for resettlees?

A. That speak to this issue, yes.

MR. PINES: That would probably be DO regulations, not DDO regulations.

THE WITNESS: Yeah, I'm sorry. DO regelations.

MR. HALE: DO, excuse me.

MR. PINES: DO is Director of Operations. DDO is Deputy Director of Operations.

MR. HALE: I am out of practice of using those terms.

BY MR. HALE:

Q. Are there regulations, sir, that deal with the DCI's review of determinations by the DO – DDO, excuse me, of resettlee benefits and resettlee grievances?

A. I know it happens, and I believe there is a procedure for requiring it do happen, but I know it happens.

[33] Q. Do not recall as you sit here whether there's actual regulations that tell the DCI how to do that particular job?

A. I just think it's part of that says subject to review by the DCI.

Q. Sir, are there, to your knowledge, any regulations that deal with the functioning of what is known as the Helms Panel?

A. I think there's a letter of instruction to that effect, but I'm not sure if it's incorporated in a regulation or not.

Q. Are the members of the Helms Panel classified other than Mr. Helms?

A. I don't think so, but I'm not sure.

MR. PINES: Let's go further on this. My understanding – I guess Bill can support me on this. The term "Helms Panel" is not acknowledged by the agency. There is a final outside review panel, the exact terminology which I cannot recall off the top of my head.

BY MR. HALE:

Q. My understanding is that in dealing with [34] resettlee grievances that there is this outside review panel which is referred to as the Helms Panel. Is that your understanding?

A. Frankly, I don't know that it's referred to as the Helms Panel. That's what I think of it as, but I'm not sure what they call it.

Q. But there is an outside panel.

A. There is an outside panel.

Q. And it's made up of retired agency officers?

A. I don't think they are – there may be some retired agency officers, but I think it's more former senior officials of the government.

Q. I see. Do you know how many persons sit on the outside panel when they review a resettlee grievance?

A. My impression is five maybe, but I don't think it's a large panel.

MR. PINES: And if you don't know the answer to these, tell him no.

THE WITNESS: Yes, I don't know. My impression is that it's not a large panel.

[35] BY MR. HALE:

Q. Just to make sure I'm clear – I think I asked this, but I'm not sure of the answer – do you know if there are regulations that govern that panel's functioning?

A. I do not know of any regulations that govern it, but I could be wrong. I just have an awareness of what exists out there.

Q. Were you involved in any way in the CIA's Inspector General review of the treatment of resettlees in the 1980's?

A. No.

Q. Did you know that that occurred?

A. I heard, but I did not – was not around doing it at that time.

Q. I take it then you didn't ever read the IG report on the intelligence community's handling of resettlees?

A. I think I've read segments of it, but I don't – I'm pretty sure I've never read the entire report.

Q. Did you ever read the classified [36] Congressional report or the unclassified report on those hearings?

A. I don't believe so.

Q. Moving on now to another topic, I'd like to just ask you a few questions about classification procedures. You are involved in classifying documents, are you not?

A. Yes.

Q. And in determining what can be unclassified?

A. Correct.

Q. My understanding would be that would be a major part of your current position; is that correct?

A. I have top secret authority, original top secret authority, delegated from the DCI, and I also have declassification authority for all DO information.

Q. When the agency originates a classified document, how does it become designated as classified?

A. Most of them are derivative [37] classifications in that whoever creates the document knows from where did the information come from, and they take that classification and give a consideration as to whether or not they have added anything to it. And it either retains that classification or perhaps might be downgraded, but it's generally based on the document from which the document comes.

Q. The source?

A. Yes.

Q. Usually then the person who creates the document would classify them?

A. Yes.

Q. When is that done, sir?

A. At the time of creation.

Q. Not to interject my personal experience in this but just to see if it still holds true, when I was at the agency if I created a document – for instance, I used to write the President's daily brief, and I would – if I wrote something for that publication, I would look at my sources, and if it was a top secret code word [38] source, then that top secret code word would go on the document as soon as I finished typing it.

Is that the way it's done now?

A. It's actually done at the moment of typing it.

Q. And that's because even if the document is inside the CIA where everybody has some form of security clearance, not everybody has a need to know everything; correct?

A. You can't get out of your document without putting a classification to it.

Q. So once it's created, it's going to have something on it that says secret or confidential or top secret; correct?

A. Some classification or unclassification designation will be on it.

Q. And again, trying to ask you this in a manner that allows to answer it unclassified, my understanding is there's a level of classification called confidential and one at secret and one at top secret; correct?

A. Correct.

[39] Q. In addition, the agency in order to further its need to know procedures also has compartmentization; correct?

A. Correct.

Q. So something can be, for example, secret and then have some compartmental code word attached to it; correct?

A. Correct.

Q. An let's just for an example use like a – well, I was going to use an example of a code word that was in a

court case, but I won't do that. Let's just call it coffee cup. There's one right here.

A. Okay.

Q. So if there was a compartmented program called coffee cup and you were creating a document that was secret coffee cup, when you created it you would mark it secret/coffee cup; correct?

A. Correct.

Q. And that then allows that document to be restricted to only persons who have A, a secret clearance, and B, a coffee cup compartment [40] clearance.

A. Correct.

Q. Can you say, sir, that there is widespread use of compartmentalization inside the agency?

A. Within the Director of Operations, yes.

Q. In the area you work. So it's quite frequent that you would see a classification with another compartment code word?

A. Correct.

Q. And is it true that if there's a compartment that you are not cleared for then you wouldn't even have reason to know it exists; correct?

A. Correct.

Q. So if you weren't cleared for coffee cup, for example, you would have no idea that coffee cup material existed usually?

A. Usually. You might know it existed, but you would not – if you've not been read in on it, you wouldn't know what it stood for.

Q. You might have seen the code word, but [41] you wouldn't know what it meant.

A. Correct.

Q. And in some particularly closely held ones, you might not ever even know the code word exists; correct?

A. Correct.

Q. For example, if there was a highly sensitive human source that was being run say by the DDO himself or herself, that might be so highly classified that only a handful of people would ever have access to that particular compartment.

A. Correct.

Q. How do you determine the need to know, sir?

A. Well, the determination rests with the possessor of the information. It's their responsibility to determine whether or not the next person has the need to know.

Q. And the need to know is that they have a need to carry out their official duties?

A. Correct.

[42] Q. Or, for example, if Congress is conducting oversight of a particular program, then if the Congress persons and the staff persons have the requisite clearance, information related to that program would be presented to them because they would have a need to know to do their oversight function; correct?

A. Correct.

Q. In a classified trial if a judge was determining the guilt or innocence of a person charged with a crime, they would have a need to know the details associated with that alleged crime; correct?

A. Unless we made a determination that a State Secrets Act was required, then yes, the judge would have the need to know and the assumed clearance to receive that information.

Q. So if a person has both the clearance level and the need to know, then access would generally be granted.

A. Oh, absolutely.

Q. As predicted, I am moving more slowly [43] than I thought I would, but let's see if I can't pick it up.

MR. HALE: Are you okay, Harold?

MR. MALKIN: Still here.

MR. HALE: If you feel the need to say anything at any time, please do. It's not fair that you're not getting your say here.

MR. MALKIN: That's quite all right. I appreciate that, and I'm not reluctant to speak up if I think it's necessary.

MR. HALE: Somehow I knew that.

Harold, I'm going to have marked now Mr. McNair's declaration as Exhibit 1.

(Exhibit No. 1 was marked for identification.)

(Document handed to the witness.)

BY MR. HALE:

Q. Mr. McNair, the court reporter has handed you what has been marked as Exhibit 1. Do you recognize that document, sir?

A. Oh, yes.

Q. Will you please say what it is?

[44] A. It's my declaration.

Q. Dated July 17, 2000?

A. Correct.

Q. And did you prepare this declaration, sir?

A. I assisted in the preparation of it.

Q. Can you tell me who assisted you?

A. Mr. Pines.

Q. I'm sorry?

A. Mr. Pines.

Q. Thank you. Is this document unclassified?

A. Yes.

Q. And obviously, sir, when you signed this, you considered it to be completely accurate?

A. Absolutely.

Q. And do you still consider it to be completely accurate?

A. Absolutely.

Q. In paragraph 1, sir, you in the second sentence indicate what the CIA Clandestine Service is responsible for among other things. And just [45] again, for the record, if you could in a few words explain what you mean by conducting foreign intelligence activities.

A. Well, as I said, including human sources, conducting covert action, liaison with foreign intelligence and security services, supporting clandestine tech operations and coordinating the CIA support to Department of Defense.

Q. But focussing just for a moment – and forgive me, I think you probably think I know what foreign intelligence operations means, and I think you certainly do, but the record needs to be complete.

So can you just explain what you mean when you say the CIA conducts foreign intelligence activities?

A. When we speak of foreign intelligence or FI, we're talking about the gathering up of protected information for passing on to policy makers in the U.S. government.

Q. How is that distinct from counterintelligence operations or activities?

[46] A. Counterintelligence is preventing an opposition service from gathering our information.

Q. When you speak of human sources, what do you mean by that, sir?

A. Human sources are those individuals that we use in the collection of this protected information.

Q. For example, a person employed in a foreign country's embassy might be a human source if you manage to recruit that person to pass information to you?

A. Yes.

Q. And covert action is what, sir?

A. Covert action are conducting those operations for which we have a or hope to have a deniability.

Q. And an example might be a disinformation campaign?

A. It might be an operation designed to change a policy of a foreign government.

Q. Or influence a foreign election for example?

[47] A. Or to change activities within a foreign government.

Q. And the distinction there being is that you undertake an activity that hopefully have some intended effect rather than just collecting information?

A. Correct. We do that at the direction of the National Security Council.

Q. Then the last example would be collection of technical – or excuse me, clandestine technical collection. What do you mean by that?

A. That would be using technical means to gather protected information.

Q. Is that like a listening device?

A. That would be one.

Q. Paragraph 2 of your declaration, sir, starts on page 2. It indicates there your responsibilities as the information review officer of the operations directorate.

When you review records in your official capacity, do you also have the responsibility for collecting those records?

[48] A. I cause them to be collected, yes.

Q. In other words, in say I would suspect maybe your most frequent requirement to do that was in response to FOIA requests?

A. We have a large section that does FOIA.

Q. I thought you might. So if a FOIA comes in, then your job is to send out requests for responsive information; is that correct?

A. Not exactly. A request that comes into the agency is then parcelled out to the component, and then we have a component. I set the policy for how the component does it and how they make the search, collect the record and do the review and release.

MR. HALE: Would you read that answer back for a minute because my mind wondered. I just want to make sure I hear it.

(Whereupon, the Court Reporter read back the previous answer.)

BY MR. HALE:

Q. So if a FOIA came in, for example, from a historian who was studying Chile and they wanted [49] information relating to the election of Alenday, would you send

the actual request out itself and say to your division chief here is a request for information relating to Alenday in 1992, respond?

A. No. Taking the example as just any example, when the request comes in and is passed over to my shop that does this, they simply search the database.

There is one director of operations database, and the people who do this go in and would conduct a search of the database to pull up the information.

Q. Does that database include information from all compartmented information?

A. The database contains all DO information with the exception of – the electronic database contains all information with the exception of one compartmented type of information.

Q. How do you search that one compartment?

A. We go to the specific division and say you must go through and look for this, but we can – we keep that one level separate from the [50] electronic database because it belongs to the specific division itself.

Q. Are you at liberty to say what division that is?

A. No. Each division has –

Q. Oh, each division has?

A. Yes.

Q. Do you also send a request to the director or the deputy director?

A. Of . . .

Q. Central Intelligence.

A. There are five elements to the agency, the DCI, the DI, DSD, DO and DA, and so each of those would get from a place that is called the Office of Information Management – they would get the request.

So that if they thought the information was contained within the DCI area, they would task the DCI area. We would not. We might refer it to the DCI. We may point out to OIM that look, you ought to check the DCI area because we have an indication that they would probably have an [51] interest in this as well.

Q. Now in this database, is there every historical record the agency has in the database?

A. That belongs to the Director of Operations.

Q. So back to 1947, you have every document that exists in that database?

A. Actually, prior to '47 because we have the U.S.S. records therein as well.

Q. I don't want to ask you what it costs to put that database together.

A. A whole heap.

Q. So as far as you know, every single document in the agency is somehow in that database or in a separate divisional database.

A. Let me correct you. Every document belonging to the Director of Operations, only the Director of Operations. The rest of the agency has another database. Only the DO has a separate database.

Q. When you do a search for FOIA, you only do the DO database?

[52] A. Our people only – we are only responsible for the Director of Operations information.

Q. And does somebody else – do the other directorates respond to the FOIA?

A. Oh, yes.

Q. You have a counterpart in each of the divisions?

A. There is one IRO in each of the other, the SNT, the DI and the DCI area.

Q. So others respond to your request, and then you do the review, or you or your people do the classification review?

A. Our office pulls up the information and does the review. If they are going to release information, they refer it to the owning component, and then we will release it.

Q. Now when the person querying the database turns up a responsive document that has a classification compartment on it that he or she is not cleared for, what happens?

A. Well, the people who do this for me all have global access as do I. If you were to go [53] into the database and ask the question and your clearance, your profile, did not match, in some cases it would tell you that this is not available to you, and some instances it would simply not appear.

But the people who do the search have the global access, and they will always see what is there.

Q. So there is nothing so compartmented inside the agency that your information review officers don't have it pop up on the screen?

A. We have an extremely limited number of people, like I think the current number is 3. I have global access, and there is nothing that I go looking for that I won't see.

Q. Then does you or one of the other two people in your division have global access get involved in every search?

A. One of those three will.

Let me say they this is what they do. This is their job. They pull them up, and then someone else reviews it.

[54] Q. Who is that someone else?

A. We have other analysts there.

Q. When did you first become familiar with our case, the case that we're here today for?

A. A year ago last Fall.

Q. So you weren't involved before the complaint was filed?

A. No.

Q. Did your involvement first relate to reviewing the complaint to see if it could be publicly filed?

A. Yes.

Q. Did you do that personally?

A. Actually, I did. We work very closely with OGC, so that as soon as anything comes in – sometimes we see

things before they do, but when it comes in, then it's an almost simultaneous effort.

Q. Now in paragraph 3 of your declaration, you in the second sentence state that, (reading):

> "The statements herein are based upon my personal knowledge, information [55] made available to me in my official capacity, the advice and counsel of the CIA Office of General Counsel," et cetera.

Can you tell me, sir, what part of the declaration here was based upon something other than your personal knowledge? In other words, one or two of the other categories, information furnished to you or advice of the General Counsel?

A. I don't think I could parse that out. I always, always, always have that third part in there about advice and counsel of the CIA Office of General Counsel.

Q. Did they help you form your opinion, the Office of General Counsel personnel?

A. There are those who say – my wife who says no one changes my mind. But we discuss it, but they usually give it to me as a clean slate and say what do you think of this.

Q. They give you the draft and you give the opinion?

A. Yes.

[56] Q. Now with regard to the declaration, did they draft it first or did you draft it?

A. They work actually off of – I don't want to say boilerplate but we know what the issues are, and then it will come to me maybe twice in draft.

Q. If I wanted to ask you what part in this declaration was in part at least based upon something other than your personal knowledge, you couldn't point that out?

A. Frankly, I doubt if I could because they run together.

Q. Now, on top of page 3 – I guess it starts on the bottom of page 2, paragraph 4 and continues on to the top of page 3, you indicate that 50 U.S.C. 403h is commonly known as PL-110. Do you see that?

A. Oh, yes.

Q. In what way is that statute known as – commonly known as PL-110? I mean who knows it that way?

A. We have debated this several times. It [57] appears in our books, of course, under the correct heading. You can't look in the book for PL-110. It's just not there. It's just a shorthand form of people who don't want to give the official title to it.

Q. Is the official title classified?

A. No, no. It's right there. You cited it.

Q. The statute?

A. 50 U.S.C., yes.

Q. It's easy to say it's PL-110, isn't it?

A. PL-110 is much easier.

Q. You say commonly known, so that would be throughout the agency that people at least throughout the DO –

A. Yes.

Q. – people know what PL-110 means.

A. Absolutely.

Q. People that you talk to in the General Counsel's Office know what PL-110 means.

A. Absolutely.

MR. PINES: Just to back up on that, sometimes Bill thinks he knows what everyone else [58] assumes. People who are involved in these sort of issues within the General Counsel's Office would know that information, not everyone would absolutely off the top of their head know what PL-110 means.

MR. HALE: So, Mr. Pines, someone like you who works with Mr. McNair would know what PL-110 means.

MR. PINES: Well, let me put it this way: I did not know what PL-110 meant until I got involved in this case.

BY MR. HALE:

Q. But the lawyers, Mr. McNair, that you work with in General Counsel other than Mr. McNair (sic) share your view that PL-1110 means the U.S.C. 403, Section H?

A. There are certainly some attorneys who would not know it because they work elsewhere in the agency, but those in litigation will quickly come to know what it is.

Q. And that's been true for some period of time. It's not a new statute, is it?

[59] A. Oh, no. It goes back to '49.

Q. Now in that same paragraph, the next sentence, you say, "I have been informed that plaintiffs further allege." I'm wondering why you use the words "I have been informed" because you actually have read these pleadings, have you not?

A. Yes.

Q. So you know what the plaintiffs allege firsthand, do you not?

A. Well, I guess this is a work of art the way it's worded like that.

Q. I have no – there's nothing particular I have in mind here. I just found that to be – in a situation where you have read the pleadings, I wondered why those choice of words were there.

So I take it maybe if you were drafting this firsthand yourself you might just say I am aware that plaintiffs are alleging because I've read the pleadings.

A. I would probably pull up that paragraph and put it in the next declaration.

Q. I see. This is a paragraph you used over [60] and over?

A. Yes, yes.

Q. Now in the last couple lines of that paragraph 4 talking about lifetime benefits, that term "lifetime benefits" appears throughout this declaration.

Would you agree with me that the plaintiffs in this lawsuit are alleging benefits other than lifetime benefits?

A. I don't know how to back it off from there. That seems an applicable phrasing to me.

Q. Is it one you chose, sir, or is this the one the lawyers chose?

A. Probably a lawyer chose it at some point, but I don't have a problem with it.

MR. HALE: Excuse me for just a minute, Harold. I'm checking something.

MR. MALKIN: Okay.

(Pause.)

MR. HALE: I'm going to hand you – I'm not going to mark this; it's a court document already – the second amended complaint, which is [61] dated March 30, 2000, and ask you just to read the first couple sentences of paragraph 5.20.

Harold, if you want, we can read that to you, but I don't know if you have it handy.

MR. MALKIN: Okay.

(Document handed to the witness, and the witness reviews document.)

BY MR. HALE:

Q. And then after you've read that, sir, if you'd turn over to paragraph 6.2 and read that paragraph.

A. Six point . . .

Q. Two.

(Witness reviews document.)

THE WIT SS: All right.

BY MR. HALE:

Q. Would you agree that those paragraphs state that plaintiffs believe they have rights in terms other than with the qualification lifetime?

A. It says they believe that, yes.

Q. So you agree with me then that the plaintiffs are alleging that they have a variety [62] of rights under what they believe is the PL-110 Program, only some of which are characterized in the context of "lifetime;" is that correct?

A. That's what your pleading says.

Q. If I could just hand this back to you again and ask you to just focus on paragraph 6.2, and agree with me, if you will please, that the plaintiffs state that the basis of their alleged rights are statute and regulation, not just statute. Do you see that, sir?

MR. PINES: I'm a little confused by this whole line of questioning because you're not actually asking for lifetime benefits as you phrase your complaint. You're suggesting that you're entitled to due process, not any sort of benefits. Isn't that correct? Or are you now stating that your clients claim they're entitled to lifetime?

MR. HALE: The complaint speaks for itself, but his declaration is all in terms of lifetime benefits, and I am

attempting to point out that the complaint characterizes our request [63] as other than just that.

MR. PINES: Well, your complaint has –

MR. HALE: Many things in it.

MR. PINES: But it's only about due process; would you agree with that?

MR. HALE: No.

MR. PINES: So you're also asking for financial benefits as well?

MR. HALE: The complaint is what it is, but we state the basis of the claim to be my current question statute as well as regulation. I mean you can read it in 6.2.

MR. PINES: Well, then I guess I'm confused as to what the questioning is. Is the question whether you're seeking benefits aside from lifetime benefits, or the question stating that you are claiming you have a statutory and regulatory right beyond a lifetime benefit?

MR. HALE: Let me suggest if the witness can answer the question I have asked, that would be great. If not, he can say he's confused, and I'll ask it a different way.

[64] BY MR. HALE:

Q. Let me restate the question because we've had kind of a colloquy here.

Do you understand the complaint to be stating that the plaintiffs believe they have certain rights that are based on regulations as well as statute?

A. That's what the words say.

Q. Did you understand that before now?

A. Yes, I thought so.

Q. Did you understand that when you prepared your declaration or when you signed the declaration?

A. I think I understood it.

Q. Now in paragraph 5 of your declaration, Mr. McNair – let me just switch to a different copy – you indicate that you have specifically reviewed any regulations or internal CIA policies concerning PL-110. Do you see that?

A. Yes.

Q. Now can you tell me how you went about reviewing the regulations that relate to PL-110, [65] first, how you gathered together those regulations and then how you reviewed them.

A. A couple of ways. I talked to the organization that deals with this as a matter of course.

Q. PL-110 you mean?

A. Yes. And asked them to go through and what are the regulations that affect them.

I talked to a section of the Director of Operations that oversees general policy questions, mand then I had one of my analysts, researchers go through and take your pleadings and take key words out and do an electronic search for these words. Then I went wondering through the entire phase myself to see if I came up with anything any different.

And knowing where the regulations for this sort of thing would be, I was able to go into the category of regulations and go through them and look and see. So I've pretty much covered the waterfront I think.

Q. And so you looked at more regulations [66] than the ones you eventually provided to us a few days ago?

A. Yeah, to see if they had any bearing on this.

Q. So you were the one who made the decision to include one regulation but not include the other in the material that you sent to us?

A. Actually, I think one of the analysts made the first cut, and then working with Daniel, and then I went through to make sure that we didn't have anything in difference. So it's – this is sort of an evolving process.

MR. PINES: If I could just interject, the discovery request or the request for production of documents dealt with paragraph 6 and items therein. You did not ask for regulations related to paragraph 5. So the ones that were provided were ones that responded to the questions or the issues raised to paragraph 6, which was would not become public charge.

MR. HALE: So there are additional regulations that might have been responsive if we [67] would have said paragraph 5.

MR. PINES: I have to read paragraph 5 to see exactly what it says.

MR. HALE: Okay.

(Pause.)

MR. PINES: Let me answer it this way: There are other regulations that discuss subsistence assistance to be provided to individuals brought into the United States under the authority of PL-110. There are other that were not turned over to you.

There are no other regulations – and Mr. McNair can verify this I believe – that concern the bolded sentence in paragraph 5 with regard to any other regulations, internal policies, et cetera, et cetera, concerning provision of any form of lifetime financial assistance to individuals brought into the United States by CIA under authority of PL-110.

BY MR. HALE:

Q. I take it if we request those other regulations that you would at least provide them [68] in a redacted form like you did the ones that we requested?

A. Anything is possible. I really – we always hesitate to release regulations even in a redacted form because your interest is in this part and then someone else's interest is in that part, and before you know it, we have on the public record the entire regulation, which we intended to be classified.

So we very reluctantly approach this release question on regulations.

Q. Let me ask you to look at that bolded language at the bottom of page 3 of your declaration. It goes on to the top of page 4.

Now if we took the word "lifetime" out of that sentence – and take a minute please to read that whole sentence and then come back.

I'll state my question again. If we took the word "lifetime" out of that sentence, would it still be an accurate sentence?

A. So if you took out the word "lifetime."

Q. Yes, sir.

[69] MR. PINES: Do you want to take a moment?

THE WITNESS: Well, I'm trying to imagine what it would look like.

MR. PINES: Let's take a moment to answer that question.

MR. HALE: We're going to take a little break here and let you caucus. We'll step out.

(Off the record.)

MR. HALE: We're back on the record.

BY MR. HALE:

Q. Do you remember the question, Mr. McNair?

A. Yes, take out the word "lifetime."

Q. Can you answer that? Would that be a correct statement if the word "lifetime" was removed?

A. Well, the only obligation would be the individual agreement we had made with the person. The regulations themselves don't call – the regulations themselves don't call for it other than what is here in the agreement we have with Justice in paragraph 6.

Q. But the agreement with Justice, would it [70] not make the statement that is in bold at the bottom of page 3 not true if you took out the word "lifetime"? Under the agreement with Justice, you in fact do have an obligation to provide financial support.

A. Until they reach citizenship.

Q. Well, the answer to the question I think is if you remove the word "lifetime" the sentence is not true.

A. That's correct.

MR. MALKIN: I guess I just want to clarify. It's not as though the statement is true or not true. The statement is made in paragraph 5, and then is quickly qualified in paragraph 6.

I don't want there to be some impression on the record that there was something misleading when in the immediately following paragraph there is a qualification made that does acknowledge that there was some interagency agreement that necessitated or obligated the CIA to perform some or to pay some sort of money to individuals for a [71] certain period of time.

It's not an important clarification, but I just don't want the word "true" or "untrue" to be taken out of context I guess.

BY MR. HALE:

Q. Mr. McNair, let me ask you to look at that sentence in bold again, and this time take out the word "financial" and tell me if it would still be an accurate sentence if the word "financial" were removed.

(Witness reviews document.)

THE WITNESS: If you took out the word "financial," obligate the agency to provide any form of lifetime assistance to individuals, then the regulations do not require that.

BY MR. HALE:

Q. And would that still be true?

A. The regulations do not require it.

Q. Lifetime assistance?

A. Right.

Q. Would you consider a provision of lifetime safety and security to be assistance?

[72] A. I don't think the regulations require. I don't think there's anything in there that says that you were to do it because what would – it would certainly change if they were to leave.

Q. Well, the regulations say what they say, and we can review that in a minute.

Now in that same bolded language, you talk about unstated principles. Can you tell me what it is that allows you to render an opinion about unstated principles of the agency?

A. I think probably the fact that I've been doing this for about 38 years now. I have about as good an understanding of what our principles under which we work are as anyone you're going to run into.

So it's my declaration, and it's my opinion that there is no unstated principle about that.

Q. About providing assistance to resettlees?

A. Right.

MR. PINES: Lifetime assistance.

MR. HALE: Lifetime assistance to [73] resettlees. Thank you, Mr. Pines.

MR. PINES: And it's also – to be more specific, it's lifetime financial assistance.

MR. HALE: Thank you again.

BY MR. HALE:

Q. Well, do you have an opinion about unstated principles of the agency with regard to financial assistance to resettlees other than lifetime?

A. We meet our obligations.

Q. And those obligations are derived from your agreements with the resettlees?

A. From the agreements and then as long as the commitments on both sides are met. There are some things you simply can't do for people.

Q. But the unstated principle that you're aware of at the agency is to meet your agreements with resettlees.

A. Absolutely.

Q. How are those agreements with resettlees documented if they are?

A. In my experience, they would be written [74] down, and they would be within a file pertaining to the individual.

Q. Have you – if I asked you whether you reviewed the file related to the plaintiffs here, would you be able to answer that question?

MR. PINES: We're going to object on grounds of national security and instruct the witness not to answer.

MR. HALE: I thought so.

BY MR. HALE:

Q. What is your understanding of the unstated principle of the agency, if any, with regard to providing lifetime safety and security to resettlees?

A. We would do so within – as long as that assistance was accepted. In other words, we wouldn't pursue someone around saying you have to let us help you, but by and large, we would take care of that sort of issue when possible.

Q. Now you say – a moment ago you said that you had been around for some 38 years in this business, so you felt like you had a fairly good [75] basis to make a statement about the agency's policies.

But would you agree with me, sir, that the 38 years has not all been with the agency?

A. Actually, a great deal of my Army experience was with the agency.

Q. So you worked together with the agency at that time then?

A. Yes.

Q. So do you think you have, for example, an understanding of what the agency's unstated principles were with regard to resettlees in 1980?

A. Oh, yes.

Q. And that's based on your time in the Army?

A. That's based on my experience as a case officer for the U.S. government.

Q. On page 4 of your declaration, sir, in paragraph 7, you quote from the Court's June 7, 2000 order, (reading):

> "The Court is confident that the case may be litigated without requiring [76] the disclosure of national security secrets."

Do you see that?

A. Yes.

Q. Do you disagree with that opinion of the Court?

A. No. The way it's written –

MR. PINES: Let's back up a little bit. It's a little misleading I think your question because it states the Court determined – as it's phrased, (reading):

> "The Court is confident that the case may be litigated without requiring the disclosure of national security secrets because, as the Court stated, the Agency has reviewed and approved "for public filings all papers filed by plaintiffs thus far."

That was the issue that he was addressing in the declaration. So I guess if your question is does he believe

that the case can be litigated without requiring the disclosure of national [77] security secrets, that's one issue.

All we're doing is quoting the Court's statement that because the agency has already reviewed this for public filing that the Court is confident.

BY MR. HALE:

Q. Mr. McNair, Mr. Pines has attempted to clarify it. Is your answer to the previous question correct, though, that as part of the sentence that I quoted you don't have any disagreement with that?

"The Court is confident the case may be litigated without requiring disclosure of national security secrets," you have no reason to challenge that, do you?

A. Ask the question again.

Q. Do you have any reason to believe that the Court is incorrect when it concludes that this case may be litigated without requiring the disclosure of national security secrets?

A. Oh, I disagree with the Court.

Q. You do?

[78] A. Yes.

Q. Can you explain why?

A. The discussion of operational relationships in an open court is impossible. The discussion of methods is an open court is impossible. The discussion of a grievance made would be highly doubtful.

If the allegations were true, then this could not be in an open court.

Q. Could it be done in a classified proceeding?

MR. MALKIN: Let me interrupt for a second. You're not asking him for a legal conclusion. You're saying based on the discussion you and he had earlier could this case be litigated in a manner similar to one of those other proceedings that he – that Mr. McNair said he had been party to?

MR. HALE: Okay. I'll accept that rephrasing.

THE WITNESS: Under those conditions, yes.

[79] BY MR. HALE:

Q. But you're convinced there's no way this case could be litigated in open court.

A. I do not believe it would be possible at all.

Q. Are you aware of the Webster v. Doe decision, Mr. McNair?

A. Just offhand, no.

Q. Are you aware that in a case involving a covert CIA employee the U.S. Supreme Court made this similar conclusion about that case?

A. I don't.

Q. You don't know that?

A. I don't know the case. I don't know the decision, no.

Q. Now you are the person who reviewed our complaint and the briefs that we've filed and the declarations that we've filed in this case; correct?

A. Are there any that I – I have to ask. Are there anything that I did not review?

MR. PINES: Let me answer this in a [80] different way. The way that the process was done was it was sent to our security officer. It was not sent to me, so I did not review it again in sort of unfair advantage.

She then sent it off to Mr. McNair's department. I do not know whether each and every time, because there were several things that went back and forth, that he actually saw every paper, but someone in his department did, and he was responsible for that.

THE WITNESS: Either coming from the security officer and those conditions, either me or my associate did it.

BY MR. HALE:

Q. Are you generally familiar, though, with what we alleged in the complaint and in the declarations that are on file in this case?

A. Whatever I said in the declaration I'm aware of.

Q. Those were approved for public filing; correct?

A. The allegations were.

[81] Q. Your position is that the allegations are not classified?

A. Well, allegations are exactly that. There is a point at which you have to step into allegations and say no.

Any time I classify something, then I'm saying one, it's true; two, I'm going to officially acknowledge it; and three, it would do damage to national security. So I'm very reluctant. You have to consider where does the information come from, and you sort of balance off what's the damage if the way it's now presented as in alleged against allowing this to go forth.

So the decision was made that in this case at that point we could sustain and still protect ourselves by considering it an allegation that did no grievance harm. It did not name any of our instillations or individuals or case officers involved.

Q. In fact, there weren't any details about places or dates or real names; correct?

A. Correct.

[82] Q. If real places and real dates and real names were used, you probably would have objected to the filing.

A. Absolutely.

Q. Because that could potentially cause harm to national security or to individuals.

A. Correct.

Q. You're aware, are you not, that the plaintiffs are proceeding in this case by the name of John Doe?

A. I'm aware that that's the name on the case, yes.

Q. And that's not their real name.

A. I assumed it was not.

Q. Can you explain to me what the potential harm would be to any individual safety, innocent or otherwise, if the agency confirmed that John Doe was a resettlee under PL-110?

A. Let's take an example. Anytime – sometimes people will say well, the individual themselves so that they were operationally involved with you. We're not going [83] to confirm it because what happens then is individual A residing in his country – once we knowledge that yes, they were operationally involved with us, then the host security service simply goes back and looks for any surveillance records they have, any investigation they have on individual A.

As long as they think individual A was perhaps involved, they will only do some things. In certain countries, they will take individual A out without any question, and they'll take all the colleagues of individual A.

Q. What do you mean take them out?

A. Well, if they're going to arrest one and they're not sure which one of five, they'll just arrest all five. That way they feel pretty sure they have got a hold of the guilty one.

But in other paces, then they will simply say okay, individual A, now we know because CIA says that they were involved with them. Well, remember we saw individual A associating with individual B, and we thought that they had an [84] interest in playing bridge together, but low and behold, now we know this was a clandestine relationship.

And isn't it amazing because individual B, an American, also was seen frequently with individual C and individual D and individual E. So all these people now

come under suspicion, and perhaps they were involved with us. Perhaps they weren't. But they were also handled by other Americans at different times, and so now they have identified some of our other officers.

So this ripple that goes out from an acknowledgement affects not only the individual themselves, but other of their countrymen, other of our officers, other mechanisms which we might have employed, such as rental of safe houses or cars or drivers or anything of this nature. So that the damage that you get from one acknowledgement is so far reaching, we simply won't allow it.

Q. I think I understand that if the individual were identified by the name that he or [85] she is using, but how can that connection be made with John Doe? Because the court pleadings in this case use the pseudonym John Doe, which is not the name that he used anywhere else in his life before. So how can you make the connection between John Doe and Tim Buck Too or individual B or C?

A. Which is why we allowed this particular pleading to go forth. You couldn't sustain a trial, an appearance in court with John Doe.

Q. Unless the courtroom were locked.

A. Oh, I have more faith in American media than that I suspect. It's just in the nature of things that we're not going to endanger our people or out operational relationships unless we were to get an absolute control over the setting.

Could you have a trial under closed conditions? I would assume anything is possible. It would be a very onerous appearance, but it would certainly never be an open trial.

Q. Can you tell me what opinion you have with regard to the allegations in the complaint [86] about the procedures used in the agency review process of the resettlee complaint?

Say for example that the resettlees counsel was not permitted to participate, would you say that the resettlees counsel was not entitled to cross-examine or the resettlee was not entitled to appear?

If you confirmed or denied those allegations, can you explain to me how that might impact, if it would in your opinion, national security?

MR. MALKIN: Steve, excuse me, just for clarification, are you asking him whether the factual statement of what happened in this particular case if he were to acknowledge as truth or as lack of truth, or are you asking him whether your characterization generally of the agency's policies and practices was true or not true?

MR. HALE: Well, I'm not sure it makes any difference. I'm really not asking him to comment on this case specifically. I'm just saying is there anything that impacted national [87] security as far as you're concerned if you acknowledged an allegation that there was or were not a certain procedural event in an agency review process for resettlees.

MR. MALKIN: Okay.

THE WITNESS: In general, it is my experience that we will lean over backwards to allow as fair a hearing as is humanly possible.

Sometimes we lean over against my recommendation because I think we're going too far, but we do happen to

have a director presently, who reminds me that he's the director and he'll do what he wants to do.

So these procedures without even addressing the specifics of them, if someone asks me if we do fair review proceedings, I would have to say yes. I think we give every possible opportunity for a fair review of whatever the subject is.

BY MR. HALE:

Q. I appreciate that answer. It's not exactly the question I asked, though.

[88] In the complaint, we allege that there were certain unfairness in the procedures that our plaintiffs encountered. Without commenting about whether our plaintiffs are in fact actually resettlees or not, are the comments about the process themselves troubling to you in the sense of disclosing national security information if you confirmed or denied the process?

A. I don't know the process that took place, and so I have trouble making a judgment on whether or not it was fair. I would be truly stunned to find that the process was not fair.

MR. PINES: If I can see if I understand your question and maybe this is one way of phrasing it.

Is your question why are the agency regulations involving the process it goes through, why are those classified? Is that the question you're asking for?

MR. HALE: No.

MR. PINES: Then I misunderstood you.

BY MR. HALE:

[89] Q. As a person who has done a couple years of law school and done all the things you've done at the agency, do you believe that the adjudicatory process is one that requires an adversary proceeding to ensure fairness?

MR. MALKIN: Wait. I think I'm going to object.

MR. HALE: What ground, Harold?

MR. MALKIN: I think that calls for a legal conclusion.

MR. HALE: Objection stated.

BY MR. HALE:

Q. Please answer the question.

THE WITNESS: I don't think I'm qualified to answer it frankly.

Q. Well, I understand, Mr. McNair, but you just said that you would be stunned if you didn't do it in a fair fashion. Of course, you know much more than I do as we sit here about what the process is, even though you also said you weren't sure what the process was.

I'd just like to know what you think is [90] fair since you gave that opinion, so I think the question is a fair one even though Harold has got the objection about a legal conclusion.

When an individual has got rights they assert, whether they're valid or invalid, is the resolution of those rights fair in your mind if there's not an adversary proceeding? Do you know what I mean by that?

MR. PINES: Before you answer the question, I'm going to add an objection on relevancy what Mr. McNair's belief is as to the fairness of an adjudicatory process that's totally irrelevant to this proceeding.

If you can answer, please do so.

THE WITNESS: I probably have been around lawyers too long. I can probably make an argument on both sides of that.

I really find it difficult to address the situation because I don't know what the procedures were.

MR. MALKIN: Steve, I think you need to be more specific because –

[91] MR. HALE: Okay. All right. I'm going to be more specific now, Harold.

MR. MALKIN: I'm telling you I have no – other than the objection, he's free to answer. But, you know, what you have alleged in the complaint as far as I'm concerned is not in all respects a nonadversary proceeding.

Your complaint acknowledges that your side was permitted to make a presentation as was according to the complaint of the agency. So certainly that could be construed to be adversarial. I think you need to flesh out with him how adversarial.

MR. HALE: I'm going to do that, Harold.

BY MR. HALE:

Q. Do you think it's important to have the ability to cross-examine witnesses in order to have a fair trial or a fair administrative proceeding?

MR. PINES: Same objection.

MR. MALKIN: I think our objection stands throughout this line of questioning.

[92] MR. HALE: I agree. It's understood.

THE WITNESS: I happen to believe in the principle that ex parte hearings are fair, and so you have to work with the circumstances as you get them.

Under the best of all circumstances, does everybody get to state their case? That would seem reasonable.

Do you have to be able to address – cross-examine the witness? Well, I can tell you I have testified in cases where I would have been most reluctant to have been cross-examined because of the nature, and certainly, not casting any aspersions, but I don't wish to go before terrorists. I don't wish to go before members of organized crime and be identified.

So There are cases where you do not – I don't think you're entitled to have a cross-examination.

BY MR. HALE:

Q. Because that would be public is what [93] you're saying?

A. No. Because it would be – there are people in whose – in which your testimony would be not well received by the opposition.

MR. HALE: I'm going to move on, Harold. I think you'll enjoy that.

BY MR. HALE:

Q. On page 5 of your declaration, sir, can you tell me in that last sentence of paragraph 8 that's in parenthesis there, why that's true with regard to counsel?

I understand your position with regard to the plaintiffs, but why is it classified whether the agency granted me a security clearance for this case or not?

A. I'm sorry. Say that again.

Q. Well, if I understand the last sentence in paragraph 8 of your declaration, you are saying that it would be classified to say whether or not I have been granted a security clearance and signe a security agreement with the agency.

A. See, it's most difficult with attorneys. [94] You can give them a clearance and inevitably their notes are put into a folder with their client's name, and since we expect these identifications to be protected and require that by and large they be held within the skiffs or protected facilities, then it's really a – for the counsel to hope to have notes in their offices almost impossible.

Q. And I think that may be a different point than one I'm asking, Mr. McNair. I understand what you're saying.

But in our pleadings, we allege that the agency has cleared myself and Ms. Allenez and that we've signed secrecy agreements, and we are adhering to those agreements.

We put those in the pleadings, and we sent them to the agency, and you cleared them or someone on your staff

cleared them, and so we filed them with the Court. The Judge in fact took note of them in his last decision that we've been cleared.

You cleared me to put that in my pleading, and now I read your declaration that [95] that's classified, and I guess I don't understand.

A. Well, no. That's not classified. Actually, your clearance was for the administrative proceedings.

Q. Okay.

A. So you can – I have no problem with that. It's just we're not going any further with it is the way I see this.

Q. I'm not sure I know what you mean you're are not going any further.

MR. PINES: I think it would help if he read the sentence above it. I think it's to which the parenthetical relates.

THE WITNESS: The reason for why that you would submit the pleadings for review and because – wait a minute.

BY MR. HALE:

Q. The preceding sentence says that people like me give you a chance to look at the pleadings before we file them for one of two reasons. We either do it voluntarily, or we do it because we've agreed to do it as part of our agreement [96] with the agency to get a security clearance.

Then as I understand the parenthetical comment, you say that which of those categories I fall in is classified, and I'm asking you to explain it.

A. Let me ask for advice of counsel as to why that's in there because the way I see it it is saying that you submitted it either voluntarily or because you were given a security clearance.

I'll have to ask Daniel. I'm sorry.

MR. PINES: I can answer on the record instead of going off. I drafted the sentence, and the reason it was drafted that way was because, as you're well aware, we contend this entire case is precluded based on Totten.

Therefore, we did not want you or the Judge or anyone else to take the suggestion that by having granted or accepted that we either grant you a security clearance or didn't grant you a security clearance, you would either submit for a review voluntarily or because we granted you a security clearance that in some way indicated the [97] truth or the nontruth of what you had alleged.

So it was not done for any other reason and unfortunately got legalized up, but that was the purpose of the sentence.

BY MR. HALE:

Q. So aside from you wanting to protect that inference, which I understand and don't have any problem with, is not a classified fact that I have signed a security agreement with you and have submitted my pleadings because I'm required to do so.

A. No, no.

Q. You didn't tell me that was classified. You cleared it to publish. I wanted to make sure there wasn't any misunderstanding.

A. No, no, no, no. Actually, I remember discussing the thing now. That was the only reason for it.

MR. HALE: Now can I confirm, Harold and Daniel, that first sentence of paragraph 9 is not intended to be a formal assertion of a States Secrets Privilege?

[98] MR. MALKIN: I'm just reading it.

I don't – I mean maybe Daniel and I should talk for a second, but my – I think my – well, let me give the Daniel the chance to respond first.

MR. PINES: Yes. We are not asserting a States Secrets Privilege through that sentence.

MR. HALE: The reason I ask that is because if you were then we'd have to do other things, and I understand some day you might assert the privilege, but we're not doing it now. This is your opinion.

MR. MALKIN: That's right.

MR. HALE: I don't want to take three hours and go through every allegation in the complaint and ask you to state the basis of it if I don't need to. I think I'm entitled first, if you do assert a privilege, to have your statement to me about why it's privileged and to the Court.

MR. MALKIN: Right. We have not to date asserted the States Secrets Privilege.

MR. HALE: We can move on, and we can save that for another day if we ever come to that.

[99] I would like to please to mark – Daniel, you don't care if we mark your fax and cover letter as part of the exhibit, do you? My main thing is this.

MR. PINES: That's fine. You can lop it all together.

MR. HALE: Harold, we're going to mark as Exhibit 2 Daniel's fax to me and cover sheet, the letter and the redacted regulations and the redacted communications that come with it.

(Exhibit No. 2 was marked for identification.)

(Document handed to the witness.)

BY MR. HALE:

Q. Mr. McNair, I've handed to you what's been marked as Exhibit 2. Is that document familiar to you?

A. Oh, yes.

Q. You may not have seen the cover fax sheet before, but those are the redacted regulations that –

A. Correct.

[100] Q. – you provided Mr. Pines to provide to me?

A. Correct.

Q. I believe I'm correct in saying that these are unclassified?

A. Yes.

Q. Can you tell me was it you, sir, who determined what to redact from the documents?

A. My associate and I talked about this. She actually did the redaction because I had a medical appointment, but I'm in agreement with this.

Q. Can you tell me – I understand from Mr. Pines' letter and from a conversation with Harold that there are two objections, one is on relevance and one is on classified information basis.

A. Correct.

Q. Which is which? Can you tell me that? I mean I know there's quite a bit being blacked out here.

MR. PINES: Let me try to clarify that [101] because I think it's a little more of a legal issue.

None of the redactions here – rephrase. All the redactions that you have here are based on national security reasons. The relevancy reason is when you go back to the regulations you only have certain pertinent paragraphs that we have pulled. We didn't include the rest of the regulation A, it's classified, but B, it wasn't relevant to what you asked for when we pulled it all apart.

MR. HALE: It might be relevant to our case but isn't relevant to what I asked for; is that correct?

MR. PINES: Correct.

MR. HALE: Well, maybe if I could ask you would it be not responsive then as opposed to being not relevant?

MR. PINES: Well, okay. It was not responsive to the question. Relevancy is of course a matter of debate.

MR. HALE: Just so you guys understand, [102] it's more than likely I'll probably give you another request that's more appropriately defined so as not quite so narrow. Because it does appear to us that these regulations do

sort of come out in the middle of a group of regulations that deal with a topic at issue in this lawsuit.

MR. PINES: Well, we can certainly have that discussion.

BY MR. HALE:

Q. Now do you ever consider when you redact this type of a document for making it unclassified substitute a word for another one?

For example, if the word "defector" was in this regulation – and you've already explained to me that the word "defector" is a classified word, but there might be another word that could be used, like resettlee or something of that nature.

Is it possible to provide that type of additional explanation so we could better read the sentence without using the classified word?

A. In most cases, yes.

[103] Q. Okay.

MR. HALE: Harold, I'll probably have a conversation with you about whether that's possible to do here.

Quite frankly, some of the sentences it looks like they're missing a noun. If that noun happens to be a code word or something like that, but if you can give me a fair substitute so we can make sense out of the sentence that might be useful. We can discuss that later off the record.

MR. MALKIN: Can I ask one quick favor? I was just handed a note. I literally need to make about a ten-

second phone call. Can I just put you on hold for one second?

MR. HALE: Sure. Go ahead. That's fine.

MR. MALKIN: By the time you frame your next question, I'll be back.

(Off the record.)

MR. HALE: Back on the record.

BY MR. HALE:

Q. Can you tell me, Mr. McNair, if these regulations were not redacted what level of [104] classification they would have?

A. Secret.

Q. Any particular compartment?

A. No.

Q. Do you know why these regulations were not provided to us earlier?

MR. PINES: I'm going to object as vague and ambiguous. Earlier when?

MR. HALE: Prior to last week, I mean like a year ago or two years ago.

MR. MALKIN: Just to make it clear, not suggesting that we did not respond as part of the matter of litigation in an appropriate way to your discovery response.

MR. HALE: Absolutely, Harold. We gave you a Rule 34 request. You responded timely. No complaint.

BY MR. HALE:

Q. I'm just asking whether you know, if you do, sir, why we didn't get copies of these a year ago or two years ago. Maybe the answer is we didn't ask for them. Maybe you don't know.

[105] A. I have no idea.

Q. Do you know that we in fact did ask for relevant regulations earlier?

A. I don't believe I know that.

Q. Mr. McNair, is it your job in any way to participate in the drafting of these types of regulations, substantive drafting?

A. No.

Q. Is it your job in any way to interpret the regulations as to what they mean?

A. No.

Q. Your job is to review them in circumstances where there's a request to give them to someone else and to make sure that they're given to them in a way that doesn't threaten national security; correct?

A. Correct.

Q. It's a security function?

A. A classification function.

Q. Thank you.

MR. PINES: Are we going to work with the regulations first? Is that what you're going to [106] look at?

MR. HALE: Yeah.

MR. PINES: I just wanted to clarify. Looking at it as I have the last couple days, I wasn't sure if it was clear what these were so I want to clarify for the record –

MR. HALE: That would be terrific.

MR. PINES: – and for you so you understand.

There are five effective regulations we've handed to you. Three of them are marked regulation A, and they are different renditions of the same regulation. One went into effect January 15, '81. It was then superseded by the one that went into effect July 13th, 1990, and then superseded by the one that's June 25th, 1999 that applies to the present time. Those were the first three.

So those are all different renditions of the exact same regulation, just at different times it was changed and rewritten. Because of the way that your request was phrased, we gave you the [107] three different versions.

The same is true for the two regulations that are marked regulation B. By the way, A and B are not their present name. The real numbering of the regulation is classified, but we just ascribed a letter to it.

So the same is true for regulation B. There are two versions here. One was in effect it looks like June 23rd, 1981. It was then superseded by regulation B that went into effect January 4, 1999.

MR. HALE: I appreciate that clarification, Daniel. The two you just spoke of, item B, regulation B, the older one is item C, 4 through 6, and the newer one is item 2, d(5).

So the 1990 regulation superseded the '81 regulation, but because of the evolution of regulations over time, the letters don't match directly. Is that what you're saying?

MR. PINES: The letters don't match, and also what happened was in the prior rendition the part that you were interested in kind of fell [108] across a couple different categories. In the more recent rendition, all that information was all in one paragraph. So rather than give you the irrelevant paragraphs, we just cut to the chase. They did get renumbered and relettered.

MR. HALE: Thank you. That helps a great deal.

In essence, what we have here are two regulations. One has three versions. One has two versions.

MR. PINES: Correct. They are the same version. They're just earlier –

MR. HALE: One superseded the other.

MR. PINES: Correct.

BY MR. HALE:

Q. Your answer earlier, Mr. McNair, when I asked you about the classification level that the whole regulation, not just what you've given me here, is secret.

A. Yes.

MR. PINES: Maybe to clarify that just a little bit more, without the redactions, each one [109] of these

regulations in whatever version you see them that sections would be mark secret, and the whole regulation of which it's a part is also classified secret.

MR. HALE: All right.

BY MR. HALE:

Q. Mr. McNair, earlier you had mentioned – when you were explaining to me some of the considerations that go into disclosures and confirmations for national security purposes, you mentioned about in some countries people might be arrested.

Can I follow up on that and ask you is it your opinion that resettlees, at least some of them, do in fact face repercussions from their former country if their identity or location were known?

A. Some of them, yes.

Q. Some of those repercussions could be physical danger?

A. Absolutely.

Q. In some extreme cases could even be [110] death?

A. Absolutely.

Q. By the way, did you have any role in reviewing anything that the agency has filed in this case?

Do you get involved that way, or do you just trust the lawyers to know what's classified and not classified?

A. They usually run it by me.

Q. Did they do it in this case? Did you look at what was filed by the government in this case?

A. I would assume so.

MR. HALE: Why don't we take about five minutes, if you would, please, and we'll come back on the record.

(Off the record.)

MR. HALE: Let's get back on the record.

BY MR. HALE:

Q. Mr. McNair, if you would look at Exhibit 2, please, and go to the next to the last regulation, the regulation B dated 1/4/99.

[111] A. Yes.

Q. About two-thirds of the way of that regulation, do you see the sentence that says "The safety and security of blank are continuing of CIA"?

A. Yes.

Q. Can you tell me if you know of what recourse a resettlee might have if the agency refused to provide that protection? I mean is there some procedure in the agency that challenged that decision?

A. I don't know the procedures for it, no.

MR. HALE: All right. Well, as I discussed with counsel before, I'm not going to close this deposition because there may be need to return to it after we have further discussions about production of additional regulations or what have you.

So I will suspend it for now, but ask you to please prepare a transcript and furnish it to me and to Mr. Pines and –

MR. MALKIN: You can actually send it to [112] us. We'll be the ones who are paying for it.

MR. HALE: Okay. That's fine.

(Whereupon, at 12:50 p.m., the taking of the deposition concluded.)

(Signature not waived.)

[113] CERTIFICATE OF DEPONENT

I have read the foregoing ___ pages, which contain the correct transcript of the answers made by me to the questions therein recorded.

_____

Subscribed and sworn to before me this ___ day of ___, 19___.

_____
Notary Public, in and for

_____

My commission expires:___

[114] ***CERTIFICATE OF NOTARY PUBLIC***

I, CHERYL KAY GERBER, the officer before whom the foregoing deposition was taken, do hereby testify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me stenographically and thereafter

reduced to typewriting under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto nor financially or otherwise interested in the outcome of the action.

/s/ Cheryl Kay Gerber
CHERYL KAY GERBER
Notary Public in and for
the District of Columbia

My commission expires: October 31, 2002

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN DOE and JANE DOE, Plaintiffs, v. GEORGE TENET, et al., Defendant.	)	Judge Lasnik Civil Action No. C99-1597L

DECLARATION OF WILLIAM H. MCNAIR

I, William McNair, hereby declare and say:

1. I am the Information Review Officer ("IRO") for the Directorate of Operations ("DO") of the United States Central Intelligence Agency ("CIA" or "Agency"). The Directorate of Operations is the CIA's Clandestine Service, and is responsible for, among other things: conducting foreign intelligence and counterintelligence activities through various means, including human sources; conducting covert action; conducting liaison with foreign intelligence and security services; supporting clandestine technical collection; and coordinating CIA support to the Department of Defense. I have held operational and executive positions in the intelligence agencies of the United States Government since 1962, and with the CIA since 1982. I served as Associate IRO for the DO from July 1993 until I was appointed to my present position in February 1994.

2. As DO/IRO, I am responsible for the review of records maintained by offices in the DO that may be responsive to Freedom of Information Act ("FOIA") or Privacy Act requests, as well as to requests from the

Department of Justice in criminal or civil litigation. I am also responsible for conducting classification reviews with respect to information originated by the DO, or otherwise implicating DO interests, including any and all Agency regulations or statutes that govern Agency actions towards Agency employees, assets, sources, defectors, etc. I am authorized to sign declarations on behalf of the Agency regarding the existence of any such regulations or statutes, and to discuss or describe the contents of any relevant regulations or statutes under the cognizance of the Agency.

3. Through the exercise of my official duties, I have become familiar with the major issues in this civil action, and with the allegations of plaintiffs that they are entitled to lifetime benefits from the Agency. The statements herein are based upon my personal knowledge, information made available to me in my official capacity, the advice and counsel of the CIA Office of General Counsel, and conclusions I reached and determinations I made in accordance therewith.

4. I have been informed that plaintiffs allege that they committed espionage upon the request of the Agency, were sponsored by the Agency to defect to the United States pursuant to Section 7 of the Central Intelligence Agency Act of 1949, 50 U.S.C. § 403h (commonly known as "PL-110"), and did in fact defect to the United States where they now reside. I have been informed that plaintiffs further allege that they are entitled to lifetime benefits from the Agency pursuant to PL-110, an Agency policy or regulation established pursuant to PL-110, or some other unspecified Agency policy or regulation providing for lifetime benefits to defectors or a certain class thereof.

5. The Directorate of Operations is the CIA directorate responsible for the processing of individuals brought into the United States by CIA under the authority of PL-110. As the court may be aware, other federal agencies may bring individuals into the United States under PL-110. As DO/IRO, I have full access to all information concerning the Agency's responsibilities under PL-110. I have specifically reviewed such information for any regulations or internal CIA policies concerning PL-110 with respect to any provisions of subsistence assistance to be provided to individuals brought into the United States under the authority of PL-110. I can inform the court unequivocally that there are no Agency or other US federal regulations that require the CIA to provide lifetime subsistence assistance to individuals brought into the United States under the authority of PL-110. **Neither PL-110, nor any other law, statute, regulation, internal policy, unstated principle or anything else has ever before, or does now, obligate the Agency to provide any form of lifetime financial assistance to individuals brought into the United States by CIA under the authority of PL-110.**

6. There is an agreement between the CIA and the Department of Justice in which CIA promised to DOJ that CIA would ensure that individuals whom the CIA brought into the United States under the authority of PL-110 would not become public charges before such time that they either attained United States citizenship, or were eligible to become United States citizens. The Agency has a regulation to this effect as well. However, I have been informed that plaintiffs in this case claim that they are presently United States citizens.

7. On page 10, lines 12-17, of this Court's 7 June 2000 Order, the Court states that, because the Agency has reviewed and approved "for public filing all papers filed by plaintiffs thus far" that "the Court is confident that the case may be litigated without requiring the disclosure of national security secrets. . . . " I wish to explain the purpose of the Agency's review of the complaint filed in this case.

8. I am the individual who, on behalf of the Agency, has conducted the review of the plaintiffs' complaint and other pleadings and posed no objection to the filing of such pleadings in open court. The CIA does not conduct a classification review, per se, of court pleadings in cases such as these. Plaintiffs pleadings contained mere allegations which, absent official US Government confirmation, did not constitute classified information. The purpose of my review, therefore, was to determine whether certain allegations, in themselves, could be so harmful to national security that I should object to their being disclosed. Such an allegation might be to name a specific individual to be a CIA officer. Whether or not true, such an allegation can jeopardize the physical safety and financial well-being of the named person, as well as his or her family. In cases when the allegation is true, the potential threat also extends to intelligence sources with whom that officer had contact. Thus, my review of a pleading generally looks to those allegations that, regardless of their truth, would threaten the national security or the safety and well-being of innocent persons. Individuals submit pleadings to CIA for such a review either voluntarily or because they have been granted a security clearance by CIA and, as a condition of receiving such a clearance, are required to submit their pleadings. (In which category plaintiffs and their counsel fall can only be discussed in a classified pleading.)

9. In this case, any Agency response to the factual assertions made in any of plaintiffs' pleadings, whether to either confirm or deny the allegations contained therein, would be classified information and could not be filed in open court. The reason for this is that, while mere allegations made by individuals about the Agency are not classified in most circumstances, when such allegations are either confirmed or denied by the Agency (or by the United States Government in general) they then bear the imprimatur of an official statement, at which point, at least in the instant case, national security issues would be raised and the matters would become classified.[1]

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed this 17 day of July 2000

William H. McNair
WILLIAM H. MCNAIR
Information Review Officer
and
Records Validation Officer
Central Intelligence Agency

[1] Although not necessarily self-evident, the denial of such a relationship would itself reveal classified information. If the CIA were to deny a relationship every time one did not exist, then any time the Agency refused to confirm or deny a relationship, it would be tantamount to an admission that such a relationship does in fact exist. Such a procedure would obviously reveal the very information that the CIA seeks to protect (i.e. a current or past covert relationship) and would risk national security.

(3)

Supreme Court, U.S.
FILED
JUN 15 2004
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No. 03-1395

In the Supreme Court of the United States

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND UNITED STATES OF AMERICA, PETITIONERS

v.

JOHN DOE AND JANE DOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The Ninth Circuit has held that *Totten* v. *United States*, 92 U.S. 105 (1875), has been subsumed within the state secrets privilege recognized in *United States* v. *Reynolds*, 345 U.S. 1 (1953), and accordingly does not require dismissal, at the outset, of suits by spies alleging that the United States has wrongfully refused to fulfill its promises. That holding is unprecedented; it effectively overrules an important decision of the Court; and it seriously interferes with the CIA's ability to conduct espionage operations and protect national security information. The decision thus warrants this Court's review.

In opposing certiorari, respondents embrace the Ninth Circuit's ruling that *Totten* is no longer good law in light of *Reynolds*, and that the case must proceed with the United States retaining the ability to advance national security interests only by asserting and litigating the state secrets privilege as to particular information. Br. in Opp. 12-20. Indeed, respondents apparently view *Reynolds* as overruling *Totten* even on its precise facts, such that spies today are entitled to proceed with a breach of contract claim, absent formal invocation of a state secrets privilege by the Director of Central Intelligence and independent determination by a court that the suit implicates classified information to such a degree that it cannot proceed. That view, however, merely confirms the importance of the issue and the need for review by this Court. Whether or not *Totten* has any continuing validity in light of *Reynolds* is a matter for this Court alone. Pet. 19; see, *e.g.*, *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

A. The Court's Review Is Warranted To Confirm That *Totten* Survives *Reynolds*

1. *The Ninth Circuit's abrogation of* Totten *is unprecedented and conflicts with the Federal Circuit's decision in* Guong

The Ninth Circuit held that *Totten* has been subsumed by *Reynolds* and that the United States must comply with the formalities of the state secrets privilege in a suit by an alleged spy seeking redress for the CIA's alleged failure to comply with its promises in an espionage agreement. Pet. App. 25a, 27a, 31a. Those rulings directly conflict with the holding in *Guong* v. *United States*, 860 F.2d 1063 (Fed. Cir. 1988), cert. denied, 490 U.S. 1023 (1989), that *Totten* continues to pose a jurisdictional bar to suits by spies to enforce contracts for covert espionage services. *Guong* thus concluded that *Reynolds* "does not limit or modify the authority of *Totten* or its rationale," and that *Totten* required outright dismissal of a suit by a CIA saboteur because the suit could not proceed without acknowledgment of a covert relationship with the CIA. *Id.* at 1066.

In arguing that the two decisions are distinguishable, respondents contend that the court in *Guong* held that assertion and litigation of the state secrets privilege was unnecessary because the court found that the suit necessarily would have involved disclosure of classified information. Br. in Opp. 16. The *Guong* court's outright dismissal of the action, rather than requiring the formal invocation of a state secrets privilege, however, is the conflict that merits this Court's review. The Ninth Circuit clearly announced a conflicting legal rule that the government may not rely on *Totten* in suits by alleged spies, but must invoke and litigate the state secrets privilege in every case.

2. *Reynolds did not overrule Totten*

Respondents suggest that other courts of appeals have recognized the abrogation of *Totten*. Br. in Opp. 12, 15-18. The Ninth Circuit, however, stands alone in that respect. The decisions cited by respondents (*id.* at 12-13, 15-19) are all inapposite; none of them holds that *Reynolds* supercedes *Totten* in cases governed by *Totten* and indeed, none involves a suit by an alleged spy.[1]

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[1] *Monarch Assurance P.L.C.* v. *United States*, 244 F.3d 1356, 1360 (Fed. Cir. 2001), was a suit by a company seeking to address a breach of promise *by* an alleged spy on behalf of the Agency, and the issue of whether *Totten* would apply in those circumstances

Respondents also cite decisions in which courts have invoked *Totten* to dismiss suits only after the state secrets privilege has been formally asserted.[2] None of those cases, however, involved the class of cases governed by *Totten*—a suit by an alleged spy—and none of the decisions presented the question of whether, in that class of cases, *Totten* has independent force after *Reynolds*.

Reynolds itself confirms that *Totten* continues to pose a jurisdictional bar "where the very subject matter of the action" is "a contract to perform espionage." 345 U.S. at 11 n.26. Moreover, this Court has continued to view *Totten* as a jurisdictional bar that "forbids the maintenance of any suit" to recover on certain claims. *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146 (1981)

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was not before the court of appeals since the United States already had validly asserted the state secrets privilege. *Air-Sea Forwarders, Inc.* v. *United States*, 166 F.3d 1170, 1171-1172 (Fed. Cir. 1999), held that a settlement agreement barred a suit by a CIA contractor—an entity whose very relationship with the CIA was not secret. The court did not reach whether *Totten*—as opposed to the settlement agreement—barred the suit and accordingly did not consider whether the government was required to assert a state secrets privilege. *Clift* v. *United States*, 597 F.2d 826, 830 (2d Cir. 1979), held that the district court erred in invoking *Totten sua sponte* in a suit by a patentee that did not have any contract (much less a secret one) with the government. Finally, *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 271 (4th Cir. 1980), rejected a government official's argument that *Totten* required dismissal in a case brought by a government employee where the state secrets privilege had already been asserted before the case reached the court of appeals.

[2] *McDonnell Douglas Corp.* v. *United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003); *Kasza* v. *Browner*, 133 F.3d 1159, 1166, 1170 (9th Cir.), cert. denied, 525 U.S. 967 (1998); *Zuckerbraun* v. *General Dynamics*, 935 F.2d 544, 547-548 (2d Cir. 1991); *Fitzgerald* v. *Penthouse Int'l, Ltd.*, 776 F2d 1236, 1241-1242 (4th Cir. 1985).

(quoting *Totten*, 92 U.S. at 107)). *Reynolds* also makes abundantly clear that in such cases the issue of a state secrets privilege is not to be litigated. Rather, "*[t]he action [i]s dismissed on the pleadings without ever reaching the question of evidence.*" *Ibid.* (emphasis added).

B. *Totten*'s Continuing Validity Is Of Paramount Importance To The CIA's Ability To Conduct Espionage Operations

Although this Court's decision in *Reynolds* remains important to the government and effectively serves its interests in the cases where a cause of action may proceed, *Totten* remains vitally important to the United States in the class of cases where recovery depends on a secret contract to provide espionage services. That type of contract necessarily forecloses the ability of an alleged spy to sue in court to enforce the contract, because it is an inherent aspect of the secret relationship that the contracting government can deny the relationship and has the sole discretion to determine whether and what type of redress is appropriate. The CIA thus has always conducted its espionage operations on the understanding that agreements for espionage services are inherently secret, and are not justiciable. Persons whose suits are entirely premised on having entered into such an agreement with the CIA should not be heard to complain that they have been arbitrarily deprived of their day in court by a policy of government secrecy. That result follows inevitably from the very nature of the secret agreement they claim to have with the CIA. Pet. 20-22.

Thus, the fundamental underpinning of *Totten* is that overriding considerations of public policy forbid a suit alleging that the United States refused to abide by a

secret promise to a spy; adjudication of the suit would conflict with the parties' implicit agreement to keep the matter entirely secret and would necessarily disclose whether a secret agreement existed and the details of that agreement. *Totten*, 92 U.S. at 106-107; Pet. 8-16. *Totten* has effectively served the national security and foreign relations interests of the United States by requiring dismissal at the outset of suits by alleged spies seeking to enforce promises by the CIA and other intelligence agencies. That regime protects against devastating disclosures of national security information (such as CIA's tradecraft methods and operations) by potential plaintiffs, discourages lawsuits seeking to force the agency to make "graymail" payments, and prevents the judiciary from being forced to review the details of uniquely sensitive arrangements. Pet. 23-24.

Those interests cannot be effectively served if the Director of Central Intelligence must assert and litigate on a case-by-case basis the state secrets privilege. Indeed, even confirmation or denial of the existence of a secret agreement as envisioned by the Ninth Circuit would defeat the most important purpose of *Totten*: to keep the entire matter utterly secret. Pet. 24-27. "A secret service, with liability to publicity in this way, would be impossible." *Totten*, 92 U.S. at 107.

C. The Court Of Appeals Erred In Refusing To Apply *Totten*

1. *Webster v. Doe does not support the Ninth Circuit's decision*

Respondents argue that permitting their constitutional claims to proceed on the merits is supported by the Court's holding in *Webster* v. *Doe*, 486 U.S. 592 (1988). See Br. in Opp. 19-22, 26. That is not correct. *Webster* held that Section 102(a) of the National Security Act of 1947, 50 U.S.C. 403-4(h), did not preclude judicial review of a CIA employee's colorable constitutional challenges to his dismissal from the agency. 486 U.S. at 601-605. *Webster* did not involve an assertion that *Totten* required dismissal of the action, and indeed the majority opinion did not even cite *Totten*, much less suggest that *Totten* is no longer good law in light of *Reynolds*.

The circumstances of *Webster* also differ considerably from those of this case. *Webster* involved a suit by an *employee* of the CIA, albeit one engaged in covert operations, and did not involve an alleged spy who had entered into a covert agreement with the agency. In the former case, acknowledgment of the mere existence of an employment relationship with the CIA, along with other details of that relationship, generally may be revealed in a lawsuit without compromising national security. In the latter case, the CIA has determined that different considerations of national security and foreign relations are implicated if the CIA were to confirm or to deny the existence of a human intelligence source recruited by a CIA case officer. In that class of cases, there is generally no aspect of an espionage relationship that can be revealed, including confirmation or denial of the relationship's existence. Pet. 14-15 & n.4. That determination is owed substantial deference because the Executive Branch is uniquely situated and entrusted to determine whether disclosure of intelligence information would compromise national security. Pet. 12.

2. *Respondents' suit is governed by Totten because it cannot proceed without disclosing the existence of a secret relationship with the CIA*

Respondents also argue that their suit to compel the CIA to conduct an internal proceeding to consider their

claim for compensation would not necessarily involve the disclosure of secret information. Br. in Opp. 23-26. Respondents are seriously mistaken. Their suit arises out of, and their standing to prove it depends upon, a classified fact—respondents' alleged covert agreement with the CIA to perform espionage services. Pet. 13-16. As even the Ninth Circuit recognized, respondents' suit cannot proceed unless and until respondents prove that they in fact had a secret agreement to conduct espionage services for the CIA. Pet. App. 35a, 37a. Without such proof, respondents have no standing to sue, and no right to relief on any claim. Pet. 15-16.

Respondents thus fundamentally misconstrue the import of *Totten* by arguing that the government must invoke the state secrets privilege in order to demonstrate that respondents' suit would compromise national security. *Totten* has already held that the very existence of an espionage arrangement—the fact upon which all of respondents' claims are based—must "for ever" remain secret. 92 U.S. at 106; Pet. 24-25. The Ninth Circuit's rejection of the holding in *Totten* warrants this Court's review.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

SCOTT W. MULLER
General Counsel
Central Intelligence Agency

JUNE 2004

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AUG 31 2004
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(5)

No. 03-1395

In the Supreme Court of the United States

GEORGE J. TENET, INDIVIDUALLY, JOHN E. MCLAUGHLIN, ACTING DIRECTOR OF CENTRAL INTELLIGENCE AND ACTING DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND UNITED STATES OF AMERICA, PETITIONERS

v.

JOHN DOE AND JANE DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: APR. 6, 2004
CERTIORARI GRANTED: JUNE 28, 2004

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 01-35419

JOHN DOE, ET AL.

v.

GEORGE J. TENET, ET AL.

DOCKET ENTRIES

DATE	PROCEEDINGS
4/13/01	Filed order (Alex KOZINSKI, Pamela A. RYMER): Filed in 01-80052: The petn for permission to appeal is granted. Within 10 days of the date of this order, petnrs shall perfect the appeal pursuant to FRAP 5(d). [01-35419] (crw) [01-35419]
	* * * * *
5/1/01	Filed John Doe motion to expedite appeal w/declaration. [01-35419] served on 4/27/01 [4156408] MOATT (crw) [01-35419]
5/1/01	Filed John Doe motion to clarify order. [01-35419], [01-35419] served on 4/27/01 [4156431] MOATT (crw) [01-35419]
5/30/01	Filed order CONFATT (CG) This cs is not sel for inclusion in the mediation program. Cnsl

DATE	PROCEEDINGS
	are requested to contact the mediator should circumstances develop that might warrant further settlement discussions. Br sch pre set by the court remains in effect. [01-35419] (kym) [01-35419]
7/19/01	Filed order MOATT (ML) Briefing is stayed pending the court's decision on th emotion by aples for clarification of the court's order in case no. 1-80052. Aples' motion to expedite this appeal will be decided following the court's decision on the motion for clarification. [01-35419] (em) [01-35419]
8/6/01	Filed order MOATT (ML) granting appellee's motion to expedite appeal. The provisions of 9th Cir.R. 31-2.2(a) shall not apply to this briefing schedule. [4156408-1] Appellants' brief, excerpts of record are due 9/5/01; aples answering brief is due within 28 day after service of the opening brief; and aplts' optional reply brief is due within 14 days after service of the answering brief. Aplts shall motior the issuance of the certificate of record. The clerk shall calendar this case on the next available calendar following receipt of aples' brief. [01-35419] (em) [01-35419]
8/27/01	Received Appellant George J. Tenet in 01-35419's brief in 15 copies 56 pages (Informal: n) deficient defective cert of compliance: notified counsel. Served on 8/23/01 [01-35419] (em) [01-35419]

DATE	PROCEEDINGS
	* * * * *
9/12/01	Filed original and 15 copies Appellants' opening brief (Informal: n) 56 pages and five excerpts of record in 1 volume; served on 8/23/01 [01-35419] (em) [01-35419]
	* * * * *
10/1/01	Filed original and 15 copies appellee John Doe in 01-35419's 56 pages brief, 1 supp Exc. vol.; served on 9/28/01 [01-35419] (em) [01-35419]
	* * * * *
10/29/01	Filed original and 15 copies USA in 01-35419, George J. Tenet in 01-35419 reply brief, (Informal: NO) 28 pages; served on 10/26/01 [01-35419] (mhf) [01-35419]
	* * * * *
12/26/01	FILED CERTIFIED RECORD ON APPEAL IN 4 VOLS.(TOTAL): 3 vols/1 expando CLERKS REC (Original) [01-35419] (sb) [01-35419]
2/7/02	ARGUED AND SUBMITTED TO Henry A. Politz, William C. CANBY, Richard C. TALLMAN [01-35419] (sb) [01-35419]
2/19/02	Received Freddi Lipstein for Appellants' letter dated 2/15/02 re: attaching copy of a letter from opponent sent to him after oral

DATE	PROCEEDINGS
	argument, and responding; served 2/15/02 [01-35419] FAXED PANEL (em) [01-35419]
3/8/02	Received counsel Steven W. Hale letter dated 3/7/02 re: responding to the 2/15/02 ltr of aplt; served 3/7/02 FAXED PANEL [01-35419] (em) [01-35419]
5/31/02	Filed order (Deputy Clerk: PA) Due to the death of Circuit Judge Politz, Judge Berzon has been drawn to replace him on the panel. [01-35419] (em) [01-35419]
	* * * * *
2/11/03	Filed USA in 01-35419, George J. Tenet in 01-35419 additional citations, served on 2/10/03 PANEL. [01-35419] (kkw) [01-35419]
3/3/03	Filed John Doe in 01-35419 additional citations, served on 2/26/03 PANEL. [01-35419] (kkw) [01-35419]
5/29/03	FILED OPINION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Costs on appeal are awarded to the aples. (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. William C. CANBY; Marsha S. BERZON, author; Richard C. TALLMAN, dissenting.) FILED AND ENTERED JUDGMENT. [01-35419] (mhf) [01-35419]
	* * * * *

DATE	PROCEEDINGS
7/11/03	[4787411] Filed original and 50 copies Appellants' petition for panel rehearing and petition for rehearing en banc 19 p.pages, served on 7/10/03 (PANEL AND ALL ACTIVE JUDGES) [01-35419] (dg) [01-35419]
7/16/03	Filed order (William C. CANBY, Marsha S. BERZON, Richard C. TALLMAN): The pla/apels are requested to file a response to the petition for rehearing and rehearing en banc within 21 days of the date of this order. The response shall not exceed 15 pages in length. [01-35419] (gva) [01-35419]
8/6/03	Filed Appellee John Doe in 01-35419's response to petition, opposing petition for enbanc rehearing [4787411-1] served on 8/5/03 (PANEL & ALL ACTIVE JUDGES) [01-35419] (mhf) [01-35419]
1/7/04	Filed order FOR PUBLICATION (William C. CANBY, Marsha S. BERZON, Richard C. TALLMAN,): . . . The petition for rehearing and the petition for rehearing en banc are DENIED. [4787411-1] Kleinfeld, Circuit Judge, with whom Circuit Judges Kozinski, O'Scannlain, Tallman, Bybee and Callahan Join, dissenting from denial of rehearing en banc. [01-35419] (hh) [01-35419]

DATE	PROCEEDINGS
1/13/04	Filed Appellants USA and George J. Tenet's motion to stay issuance of the mandate; served on 1/12/04 (to AUTHOR) [4945279] [01-35419] (hh) [01-35419]
1/13/04	Filed order (Marsha S. BERZON,): The govt's motion to stay issuance of the mandate pending the filing of a petition for a writ of certiorari is GRANTED. [4945279-1] [01-35419] (hh) [01-35419]
1/20/04	Filed Appellee John Doe's bill of costs ($110.00), served on 1/16/04 [01-35419] (hh) [01-35419]
4/13/04	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 03-1395 filed on 4/6/04. [01-35419] (hh) [01-35419]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
(SEATTLE)

Docket No. 2:99-cv-01597-RSL

JOHN DOE, ET AL.

v.

GEORGE J. TENET, ET AL.

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/06/1999	1	COMPLAINT (Summons(es) issued) Receipt # 261310 (PM) (Entered: 10/10/1999)
12/17/1999	3	AMENDED COMPLAINT [1-1] by plaintiff John Doe, plaintiff Jane Doe (JN) (Entered: 12/27/1999)
		* * * * *
12/23/1999	2	STIPULATION and ORDER by Judge Robert S. Lasnik regarding scheduling. Defts have until 1/27/00 to file a motion to dismiss, answer or other responsive pleading. Pltf's intend to serve upon defts a motion for injunctive or other

DATE	DOCKET NUMBER	PROCEEDINGS
		relief due on or before 1/17/00. (See order for further details) (cc: counsel, Judge) (MD) (Entered: 12/23/1999)
01/24/2000	4	MOTION by defendant USA to dismiss NOTED FOR 4/7/00 (MD) (Entered: 01/28/2000)
01/24/2000	5	MEMORANDUM by defendant USA in support of motion to dismiss for lack of subject matter jurisdiction or, alternatively, for failure to state a claim[4-1] (MD) (Entered: 01/28/2000)
		* * * * *
02/07/2000	6	MOTION by plaintiffs for preliminary injunction and waiver of injunction bond (OA requested and set for hearing per stipulation and order dated 12/21/99 for 4/21/00) NOTED FOR 4/7/00 (VK) (Entered: 02/08/2000)
02/07/2000	7	MEMORANDUM by plaintiff in support of motion for preliminary injunction and waiver

DATE	DOCKET NUMBER	PROCEEDINGS
		of injunction bond (OA requested and set for hearing per stipulation and order dated 12/21/99 for 4/21/00) [6-1] (VK) (Entered: 02/08/2000)
02/07/2000	8	DECLARATION of John Doe by plaintiffs re motion for preliminary injunction and waiver of injunction bond (OA requested and set for hearing per stipulation and order dated 12/21/99 for 4/21/00) [6-1] (VK) (Entered: 02/08/2000)
02/07/2000	9	DECLARATION of Jane Doe by plaintiffs re motion for preliminary injunction and waiver of injunction bond (OA requested and set for hearing per stipulation and order dated 12/21/99 for 4/21/00) [6-1] (VK) (Entered: 02/08/2000)
02/07/2000	10	DECLARATION of Steven W. Hale by plaintiffs re motion for preliminary injunction and waiver of injunction bond (OA

DATE	DOCKET NUMBER	PROCEEDINGS
		requested and set for hearing per stipulation and order dated 12/21/99 for 4/21/00) [6-1] (FILED IN EXPANDO) (VK) (Entered: 02/08/2000)
		* * * * *
02/09/2000	12	RETURN OF SERVICE of summons and complaint executed upon defendant USA on 2/8/00 (dktclk) (Entered: 02/14/2000)
03/10/2000	13	RESPONSE by plaintiff John Doe, plaintiff Jane Doe to motion to dismiss [4-1] (CL) (Entered: 03/13/2000)
03/15/2000	14	ORDER/NOTICE OF JOINT STATUS REPORT Joint Status Report due 6/19/00 (cc: counsel, Judge) (VK) (Entered: 03/15/2000)
03/30/2000	15	CERTIFICATE of Carol Kness re: service of amd complaint [3-1] and complaint [1-1] (Exhibits 1-6 Attached) (KERR) (Entered: 04/04/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
03/30/2000	16	STIPULATION allowing amendment to complaint (KERR) (Entered: 04/04/2000)
03/30/2000	17	SECOND AMENDED COMPLAINT by plaintiffs (KERR) (Entered: 04/04/2000)
04/05/2000	18	MINUTE ORDER by Judge Robert S. Lasnik SETTING pltf's motion for preliminary injunction and waiver of injunction bond (OA requested and set for hearing per stipulation and order dated 12/21/99 for 4/21/00) [6-1] at 9:00 4/25/00 (cc: counsel, Judge, GG) (VK) (Entered: 04/06/2000)
04/07/2000	19	MINUTE ORDER by Judge Robert S. Lasnik SETTING oral argument for pltf's motion for preliminary injunction and waiver of injunction bond (OA requested and set for hearing per stipulation and order dated 12/21/99 for 4/21/00) [6-1] at 9:00 4/25/00, SETTING oral argument for deft's motion to dismiss [4-1] at 9:00 4/25/00 (cc: counsel, Judge, GG) (VK) (Entered: 04/07/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
04/10/2000	20	REPLY by defendant TO RESPONSE to motion to dismiss [4-1] (KERR) (Entered: 04/12/2000)
04/10/2000	21	REPLY by plaintiff TO RESPONSE to motion for preliminary injunction and waiver of injunction bond (OA requested and set for hearing per stipulation and order dated 12/21/99 for 4/21/00) [6-1] (KERR) (Entered: 04/12/2000)
04/24/2000	22	MINUTES: RSL; Dep Clerk: Gail; CR: Sue Palmerton; Pla Counsel Steven Hale; Def Counsel Harold Malkin. Oral Argument held on motion for prel inj and court to issue order (MD) (Entered: 04/26/2000)
		* * * * *
05/10/2000	23	TRANSCRIPT of proceedings for the following date(s): 4/25/00 (Re: Hearing on Motions) CR initials: S. Palmerton (dktclk) (Entered: 05/10/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
06/07/2000	24	ORDER by Judge Robert S. Lasnik DENYING pltfs' motion for preliminary injunction [6-1]; GRANTING defts' motion to dismiss [4-1] with respect to pltfs' equal protection claim and DENYING it in all other respects (cc: counsel, Judge) (VK) (Entered: 06/07/2000)
06/12/2000	25	MINUTE ORDER by Judge Robert S. Lasnik joint status report ddl continued to 6/23/00 (cc: counsel, Judge) (VK) (Entered: 06/12/2000)
		* * * * *
06/20/2000	28	JOINT STATUS REPORT filed by all parties. (VK) (Entered: 06/22/2000)
06/21/2000	26	STIPULATION and ORDER by Judge Robert S. Lasnik: defts' have until 7/19/00 to file their answer (cc: counsel, Judge) (VK) (Entered: 06/21/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
06/21/2000	27	MINUTE ORDER SETTING TRIAL DATE AND RELATED DATES PURSUANT TO LR 16 by Judge Robert S. Lasnik Deadline to Join Additional Parties is 7/19/00; discovery mtn filing ddl set for 1/29/01; discovery ddl set for 2/5/01; dispositive mtns ddl set for 3/5/01; 39.1 designation effective set for 4/20/01; pretrial order ddl set for 5/4/01; Motions in Limine deadline 5/4/01; trial brief ddl set for 5/30/01; trial set for 6/4/01 (length of trial 4-7 days) (cc: counsel, Judge, GG) (VK) (Entered: 06/22/2000)
07/19/2000	29	MOTION by defendants for summary judgment or in the alternative renewed mtn to dismiss NOTED FOR 8/11/00 (KERR) (Entered: 07/24/2000)
07/19/2000	30	MEMORANDUM by defendants in support of motion for summary judgment or in the alternative renewed mtn to dismiss (KERR) (Entered: 07/24/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
07/25/2000	31	STIPULATION and ORDER by Judge Robert S. Lasnik RENOTED FOR 9/29/00 defts' motion for summary judgment or in the alternative renewed mtn to dismiss [29-1]; pltfs' response due 9/11/00; defts' reply due 9/29/00 (cc: counsel, Judge) (VK) (Entered: 07/26/2000)
		* * * * *
09/12/2000	32	STIPULATION and ORDER by Judge Robert S. Lasnik RENOTED FOR 10/13/00 federal defts' motion for summary judgment or in the alternative renewed mtn to dismiss [29-1]; response due 9/25/00; reply due 10/12/00 (cc: counsel, Judge) (VK) (Entered: 09/13/2000)
		* * * * *
10/03/2000	33	STIPULATION and ORDER by Judge Robert S. Lasnik allowing parties to file overlength briefs (cc: counsel, Judge) (VK) (Entered: 10/03/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
10/04/2000	34	RESPONSE by plaintiffs to motion for summary judgment or in the alternative renewed mtn to dismiss [29-1] (KERR) (Entered: 10/05/2000)
10/04/2000	35	DECLARATION of Steven Hale by plaintiffs re: motion response [34-1] (KERR) (Entered: 10/05/2000)
10/04/2000	36	MOTION by plaintiff to strike portions of William H McNair's declaration NOTED FOR 10/13/00 (KERR) (Entered: 10/06/2000)
		* * * * *
10/10/2000	39	RESPONSE by defendants to motion to strike portions of William H McNair's declaration [36-1] (KERR) (Entered: 10/12/2000)
10/11/2000	38	STIPULATION and ORDER by Judge Robert S. Lasnik RENOTED FOR 10/20/00 Federal defts' motion for summary judgment or in the alternative renewed mtn to dismiss [29-1]; reply due 10/17/00 (cc: counsel, Judge) (VK) (Entered: 10/12/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
10/16/2000	40	MINUTE ORDER by Judge Robert S. Lasnik RENOTED FOR 10/20/00 pltfs' motion to strike portions of William H McNair's declaration [36-1] (cc: counsel, Judge) (VK) (Entered: 10/16/2000)
10/17/2000	41	REPLY by federal defendant TO RESPONSE to motion for summary judgment or in the alternative renewed mtn to dismiss [29-1] (RS) (Entered: 10/19/2000)
10/20/2000	42	REPLY by plaintiff re: to defts' response to motion to strike portions of Wm H. McNair's Declaration [36-1] (MD) (Entered: 10/24/2000)
10/20/2000	43	MOTION by plaintiff to strike portions of defts reply (submitted in connection with defts' "renewed" motion to dismiss noted for 10/20/00) NOTED FOR 10/20/00 (MD) (Entered: 10/24/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
10/20/2000	45	MOTION by defendant USA for protective order NOTED FOR 11/10/00 (MD) (Entered: 10/24/2000)
10/20/2000	46	MEMORANDUM by defendant USA in support of motion for protective order [45-1] (MD) (Entered: 10/24/2000)
		* * * * *
10/24/2000		PRAECIPE by George J Tenet, USA to attach or replace documents to motion for protective order [45-1] in the Court file. (KERR) (Entered: 10/28/2000)
10/24/2000	47	RESPONSE by defendant to motion to strike portions of defts reply (submitted in connection with defts' "renewed" motion to dismiss noted for 10/20/00) [43-1] (KERR) (Entered: 10/28/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
10/27/2000	48	REPLY by plaintiff TO RESPONSE to motion to strike portions of defts reply (submitted in connection with defts' "renewed" motion to dismiss noted for 10/20/00) [43-1] (KERR) (Entered: 10/31/2000)
10/27/2000	49	DECLARATION of Steven Hale by plaintiff re: motion reply [48-1] (KERR) (Entered: 10/31/2000)
		* * * * *
11/06/2000	51	RESPONSE by plaintiff to motion to stay discovery and in support of cross-motion for discovery conf and referral to 39.1 mediation (VK) (Entered: 11/09/2000)
11/06/2000	52	Supplemental DECLARATION of Steven W. Hale by plaintiffs re: motion response [51-1], re: motion reply [51-2] (VK) (Entered: 11/09/2000)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/07/2000	54	REPLY by defendants to pltfs' response to motion to stay discovery and response to pltfs' cross-mtn (KERR) (Entered: 11/09/2000)
01/22/2001	55	ORDER by Judge Robert S. Lasnik DENYING dft's motion for summary judgment or in the alternative renewed mtn to dismiss [29-1] (cc: counsel, Judge) (CL) (Entered: 01/22/2001)
01/22/2001	56	ORDER REGARDING DFTS' MTN FOR A PROTECTIVE ORDER by Judge Robert S. Lasnik. The Court has referred this matter to the Honorable Wm L. Dwyer who will serve as a mediatior/settlement judge. Parties should contact Judge Dwyer's chambers to establish a time in late Feb or early March for a mediation. In the interim, the Court will stay discovery until this mediation occurs but will set a

DATE	DOCKET NUMBER	PROCEEDINGS
		discovery conference to outline what issues will emerge should the matter proceed to trial (cc: counsel, Judge) (CL) (Entered: 01/22/2001)
01/22/2001	57	ORDER APPOINTING U.S. DISTRICT JUDGE WILLIAM L. DWYER AS SETTLEMENT JUDGE by Judge Robert S. Lasnik. The Court directs counsel to contact Judge Dwyer's Judicial Assistant, Trish Graham at 206-553-0103 to schedule a settlement conference for late Feb or early Mar, 2001. (cc: counsel, RSL, WLD, TG)) (CL) (Entered: 01/23/2001)
01/25/2001	58	MINUTE ORDER by Judge Robert S. Lasnik. A discovery conference has been scheduled at 9:00 2/15/01 in room 911. (cc: counsel, Judge, GG) (CL) (Entered: 01/26/2001)
02/02/2001	59	MINUTE ORDER by Judge Robert S. Lasnik Settlement Conference set for 9:00 3/9/01

DATE	DOCKET NUMBER	PROCEEDINGS
		before Judge Dwyer; briefs due two days prior to conf (cc: counsel, RSL, G G, WLD, EM) (VK) (Entered: 02/02/2001)
02/15/2001	60	MINUTE ORDER by Judge Robert S. Lasnik. Dft's mtn regarding interlocutory appeal should be filed no later than 4:30pm on 2/22/01. Pltf's opposition should be filed no later than 4:30pm on 2/26/01, dft's reply due 4:30pm 2/28/01 (cc: counsel, Judge) (CL) (Entered: 02/15/2001)
02/22/2001	61	MINUTE ORDER by Judge Robert S. Lasnik directing deft's motion for interlocutory appeal be filed by 2/22/01; pltf's opposition by 2/26/01; deft's reply by 2/28/01 (cc: counsel, Judge) (VK) (Entered: 02/23/2001)
02/22/2001	62	MOTION by defendant USA for certification of interlocutory orders and for stay of further proceedings NOTED FOR 2/28/01 (CL) (Entered: 02/26/2001)

DATE	DOCKET NUMBER	PROCEEDINGS
02/22/2001	63	MEMORANDUM by defendant USA in support of motion for certification of interlocutory orders and for stay of further proceedings [62-1] (CL) (Entered: 02/26/2001)
		* * * * *
02/26/2001	73	RESPONSE by plaintiffs to motion for certification of interlocutory orders and for stay of further proceedings [62-1] (CL) (Entered: 03/15/2001)
		* * * * *
02/27/2001	66	STIPULATION and ORDER by Judge Robert S. Lasnik. Pursuant to the Stipulation of the parties, it is hereby ORDERED: pltfs can file overlength brief in response to dft's mtn for certification of interlocutory orders (cc: counsel, Judge) (CL) (Entered: 03/06/2001)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
02/28/2001	67	REPLY by defendants TO RESPONSE to motion for certification of interlocutory orders and for stay of further proceedings [62-1] (CL) (Entered: 03/06/2001)
03/02/2001	68	LETTER by plaintiff John Doe, plaintiff Jane Doe re: motion reply [67-1] (CL) (Entered: 03/07/2001)
03/02/2001	69	SUR-RESPONSE by plaintiffs to motion for certification of interlocutory orders and for stay of further proceedings [62-1] (CL) (Entered: 03/07/2001)
		* * * * *
03/08/2001	71	ORDER by Judge Robert S. Lasnik. IT IS ORDERED: dfts are hereby given permission to file a sur-reply no later than 3/12/01. The Court will issue a decision on mtn for interlocutory appeal and for a stay on 3/14/01. (cc: counsel, Judge) (CL) (Entered: 03/08/2001)

DATE	DOCKET NUMBER	PROCEEDINGS
03/12/2001	72	REPLY by defendant TO RESPONSE to motion for certification of interlocutory orders and for stay of further proceedings [62-1] (CL) (Entered: 03/14/2001)
03/14/2001	74	ORDER by Judge Robert S. Lasnik GRANTING dfts' motion for certification of interlocutory orders and for stay of further proceedings [62-1]. Stay is granted pending the outcome of the interlocutory appeal. (cc: counsel, Judge) (CL) (Entered: 03/15/2001)
04/16/2001	75	ORDER (CCA 01-80052) Petition for permission to appeal is GRANTED. W/in 10 days of this order petitioner shall perfect the appeal. (JK) (Entered: 04/16/2001)
04/16/2001	76	SUBSTITUTION OF COUNSEL on behalf of George J. Tenet, USA Susan M. Demske terminating attorney Harold Malkin for USA, attorney Harold Malkin for George J. Tenet (CL) (Entered: 04/18/2001)

DATE	DOCKET NUMBER	PROCEEDINGS
09/17/2001	77	NOTICE by defendant of change of address of Susan Demske/amended notice of withdrawal and substitution of counsel; adding Brian C. Kipnis as local counsel (VK) (Entered: 09/17/2001)
12/21/2001		CLERK'S RECORD ON APPEAL transmitted to Circuit (vol. 1-3, expando 1) (SA) (Entered: 12/21/2001)
07/21/2003	78	ORDER of USCA (01-35419): plaintiffs-appellees requested to file response to petition for rehearing w/in 21 days of this order. (ZG,) (Entered: 08/04/2003)

SECURITY GUIDANCE FOR REPRESENTATIVES

As you may be representing a client who is affiliated with the Central Intelligence Agency, the Office of Personnel Security, Central Intelligence Agency is providing the following guidance for your review. This guidance answers typical questions that you may have about working with classified information. The guidance assumes that you have been approved to receive a Secret clearance in conjunction with your anticipated representation of an Agency-affiliated client. If you have any questions about the guidance, please telephone your designated Agency security officer, named in the cover letter.

What does my Secret clearance mean, in general?

You have been granted a Secret clearance in anticipation that representing your client may involve classified information. In fact, the mere association of your client with the Agency may be classified. As a result, you may be authorized access to certain information classified up to and including Secret, provided that an appropriate Agency official has first determined you have a bona fide need-to-know for the information.

Your clearance is for you alone and is limited to your representation of your client in this particular case. *It is not transferable* to other cases involving your client, to other cases involving other Agency-affiliated individuals, or to matters involving other US Government organizations unconnected with your client. *Unless you are specifically authorized by the Agency*, your clearance does not allow you to access Agency facilities, interview other Agency-affiliated personnel, discuss classified information with anyone (including persons in your office) who lacks a security clearance and a bona

fide need-to-know, and access and/or store any classified documents or other classified information in any form.

What if I need to discuss this case or share information with others in my office?

You may discuss this case or share case-relevant information with others in your office, provided that you do not divulge classified information, including, but not limited to, your client's name and association with the Agency, if this association is classified. If you believe that others in your office will need access to classified information, contact your designated Agency security officer and request that those requiring access also be cleared. The Agency determines who has a need-to-know for classified information and who will be submitted for a security clearance. You may not discuss or otherwise share classified information with other people until the Agency advises you that they have received their clearances and have completed all the steps you are being asked to complete as a cleared representative. If you have questions about whether you may discuss or otherwise share classified information with someone, please contact your designated Agency security officer.

How do I know when information is classified?

Your client should not be providing you with classified information in any form unless the appropriate security arrangements have been made by your designated Agency security officer. If you are in doubt as to the classification of information you have received or wish to receive, your designated Agency security officer will assist you in determining the information's classification status. If your client provides you with information, such as the first and last names (vice first names and last initials) of Agency-affiliated individuals, intelligence sources or methods, site names or specific locations, summaries or details of Agency operations, detailed Agency organizational structures, statistics, and/or technologies, the information is most likely classified. You should handle and protect any and all such information as classified until your designated Agency security officer determines the classification status of the information.

What rules must I follow when working with information that may be classified?

The most important rule is that you may only discuss or otherwise share classified information with people who have an Agency-provided Secret clearance, at a minimum, and an Agency-determined need-to-know for the information. You also may not undertake discussions of classified information in the presence of uncleared persons or cleared persons lacking need-to-know.

A second important rule is that you may only review, create, store, and/or otherwise work with or handle classified information in an Agency secure area. The Agency secure area will be an office-like environment where you may more freely discuss classified or other sensitive details of the case with your client or other cleared members of your office, review classified information, create documents based upon this information, and store any documents or notes based upon this information. The Agency will provide you with paper and pens/pencils, stand-alone information processing equipment (e.g., a personal computer), and storage facilities. Only Agency-provided equipment and facilities may be used to create documents containing classified information. As an alternative, your designated

Agency security officer can arrange for classified documents to be redacted into unclassified form for use at your office. You, however, may neither create classified documents at your office, nor may you reconstruct classified documents from redacted, unclassified documents stored at your office.

When working in the Agency secure area, you will be escorted by your client or a cleared person unaffiliated with the case. Your designated Agency security officer will have any documents or notes you wish to remove from the secure area reviewed for classification purposes. If the documents or notes are classified, they must be sanitized before removal or remain in the secure area. Due to the difficulty with reviewing information in forms other than hardcopy, only unclassified hardcopy documents may be removed after approval. *Appropriate arrangements will be made to ensure that attorney-client privilege is preserved during the Agency's review of documents for classification purposes.*

In what forum may I present classified information, if necessary?

Presentation of classified information in a public forum is never permitted. Most cases do not require the presentation of classified information. However, the Equal Employment Opportunity administrative proceedings are conducted in a classified setting up to the Secret level. If your client requests an administrative hearing under 29 C.F.R. 1614.108(f), either party may present classified information at the hearing. In most cases, it is not necessary to include classified information in the text of motions, briefs, or correspondence relating to the proceeding.

What procedures do I follow prior to submitting a court filing or otherwise promulgating anything related to or based upon my client's case, regardless of the classification?

Prior to submitting a court filing or otherwise promulgating anything related to or based upon your client's case, provide a copy of the filing or other information to your designated Agency security officer, unless you have made other arrangements with the Agency to ensure that classified information is not publicly disclosed. Your designated Agency security officer will ensure that an appropriate Agency representative unaffiliated with the case conducts a prepublication review of the information. This review will ensure that classified information is not disseminated to persons lacking appropriate clearances or approvals.

What do I do if my client fails to gain Agency approval prior to releasing classified information to me or provides me such information outside of an Agency secure area?

If your client fails to gain Agency approval prior to releasing classified information or provides such information outside of an Agency secure area, contact your designated Agency security officer immediately.

What are the penalties for failing to adhere to this guidance?

When you read and sign the Nondisclosure/Secrecy Agreement and the Acknowledgment of Security Requirements form, you agree to adhere to this guidance as well as any other requirements noted in the agreement or form. Your failure to adhere to these requirements may result in the Agency withdrawing your security clearance and/or your breach being referred to the Department of Justice for possible criminal prose-

cution. The Agency also reserves the right to withdraw your security clearance should it receive any information indicating that you should not have continued access to classified information.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
(SEATTLE)

No. C99-1597L

JOHN DOE AND JANE DOE, HUSBAND AND WIFE,
PLAINTIFFS

v.

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND THE UNITED STATES OF AMERICA, DEFENDANTS

DECLARATION OF STEVEN W. HALE

STEVEN W. HALE states as follows:

1. I am one of the attorneys of record for the plaintiffs, John Doe and Jane Doe, know the contents of this declaration to be true and am otherwise competent to testify thereto.

2. In response to plaintiffs' Second and Third Requests for Production and plaintiffs' counsel's additional request to view unredacted documents at a secure Agency facility, defendants refused to produce anything, even in redacted form. In addition, defendants refused to produce any documents, including Regulation C, in a secure Agency facility on October 12, 2000 in Washington, D.C. when Betsy Alaniz and I were in Washington D.C. for this express purpose. In a Rule 37 conference on October 19, defendants acknowledged that, while Ms. Alaniz and I had the requisite security clearances to review additional PL-110 regulations, the

Agency's refusal to allow access was predicated on a determination that we "did not have a need to know."

3. As is evidenced by the Stipulation and Agreed Order of June 21, 2000, plaintiffs agreed not to require an answer to the complaint for a specific time during which defendants were to file what defendants' counsel described as "supplemental briefing," allegedly invited by footnote 7 in the Court's June 7, 2000 order. Never did defendants mentioned the filing of a summary judgment motion that would be supported by alleged evidence. If a motion for summary judgment would have been mentioned, plaintiffs would have objected, since discovery had not even begun, and would not have agreed to the Stipulated Order.

I CERTIFY UNDER PENALTY OF PERJURY under the laws of the United States of America that the foregoing is true and correct.

SIGNED AND DATED at Seattle, Washington, this 26th day of October, 2000 by STEVEN W. HALE.

/s/ STEVEN W. HALE
STEVEN W. HALE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
(SEATTLE)

No. C99-1597L

JOHN DOE AND JANE DOE, HUSBAND AND WIFE,
PLAINTIFFS

v.

GEORGE J. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND THE UNITED STATES OF AMERICA, DEFENDANTS

SUPPLEMENTAL DECLARATION OF STEVEN W. HALE

STEVEN W. HALE states as follows:

1. I am one of the attorneys of record for the plaintiffs, John Doe and Jane Doe, know the contents of this declaration to be true and am otherwise competent to testify thereto.

2. Counsel for defendants has demanded, pursuant to a letter of November 2, 2000 that plaintiffs correct what defendants contend is a misleading statement in the reply brief and the corresponding declaration submitted to the Court in connection with the pending motion by defendants. Attached hereto as Exhibit 1 is a true and correct copy of Mr. Malkin's November 2, 2000 letter.

3. Plaintiffs do not believe that the subject statement is misleading in any way. Nonetheless, because of

defendants' demand, and in order to promptly clarify any potentially unclear facts, plaintiffs submit to the Court a true and correct copy of their response to defendants' counsel (attached hereto as Exhibit 2), which explains the situation in some detail.

I CERTIFY UNDER PENALTY OF PERJURY under the laws of the United States of America that the foregoing is true and correct.

SIGNED AND DATED at Seattle, Washington, this 6th day of November, 2000 by STEVEN W. HALE.

/s/ STEVEN W. HALE
STEVEN W. HALE

EXHIBIT 1

Seal Omitted

U.S. Department of Justice

United States Attorney
Western District of Washington

Please reply to:
Harold Malkin
Assistant United States Attorney
Direct Line: (206) 553-6526

601 Union Street, Suite 5100
Seattle, Washington 98101-3903

Tel: (206) 553-7970
Fax: (206) 553-0882

November 2, 2000
[Received: Nov. 3, 2000]

Via FAX and Regular Mail
Steven Hale, Esq.
Perkins Coie
1201 Third Ave., Suite 4800
Seattle, WA 98101-3099

Re: Doe v. Tenet, et al.
No. C99-1597L, USDC, W.D. Washington

Dear Steve:

I have been reflecting upon our conversation the other day during which I expressed to you my concern over a representation you made in both Plaintiffs' Reply Motion to Strike Portions of Defendants' Reply and the declaration you submitted in support thereof. Specifically you state in Plaintiffs' Reply that:

> Defendants even refused to produce additional regulations, which would have included Regulation C, in a secure Agency facility on October 12, 2000 in Washington, D.C. when plaintiffs' counsel were in Washington, D.C. for this express purpose.

Reply at 2. Likewise, in your declaration, you state:

> In addition, defendants refused to produce any documents, including Regulation C, in a secure

> Agency facility on October 12, 2000 in Washington, D.C. when Betsy Alaniz and I were in Washington, D.C. for this express purpose.

Declaration at paragraph 2.

The impression you are clearly attempting to create is that the CIA allowed you and Betsy to travel to Washington, D.C. for the "express purpose" of reviewing Agency documents and that the CIA thereafter refused to make documents available to you. The suggestion that the CIA acted in the fashion you imply is factually inaccurate and you know it to be so.

As you well know and acknowledged during our conversation, you and Betsy were informed in advance of your trip to Washington, D.C. that the CIA would not be making any documents available for your inspection. Furthermore, as you also acknowledged, your trip to Washington, D.C. was not for the "express purpose" of reviewing the aforementioned documents. The fact is that you and Betsy were traveling to Washington, D.C. principally, and in any case, to attend a firm partnership meeting.

I would appreciate your taking immediate action to correct the record on this issue. If no such action is taken by COB Monday, November 6, I will take whatever steps I deem necessary to set the record straight.

Thank you for your prompt attention to this matter.

Sincerely,

KATRINA C. PFLAUMER
United States Attorney

/s/ HAROLD MALKIN
HAROLD MALKIN
Assistant United States Attorney

EXHIBIT 2

PERKINS COIE LLP

1201 THIRD AVENUE, SUITE 4800 SEATTLE, WASHINGTON 98101-3099
TELEPHONE: 206 583-8888 FACSIMILE: 206 583-8500

Steven W. Hale
(206) 583-8633
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November 6, 2000

Harold A. Malkin, Esq.
U.S. Attorneys' Office
601 Union Street, Suite 5100
Seattle WA 98101

Re: John Doe and Jane Doe v. Tenet and United States of America
U.S. District Court Cause #C99-1597L

Dear Harold:

This letter replies to your letter of November 2, 2000.

You are mistaken in your statement that I "acknowledged" in our recent conversation that Betsy and I were not in D.C. for the "express purpose" of viewing CIA documents. What I acknowledged is what you already knew, that we were there on October 12 to work on this case and were then attending a partners' meeting beginning on October 13. The fact that we had other business the day after our business on this case does not mean that we were not in D.C. on October 12 expressly for the purpose of working on this case.

As I explained in our recent conversation, the purpose of our representation to the Court about defendants' failure to produce documents was in support of our contention that defendants should not be able to make arguments about what is referred to as Regulation C, because this and related documents had not

been produced to us. Thus, it was unnecessary to explain all of the details to the Court related to defendants' refusal to produce documents to us. The relevant facts are that we requested that defendants produce documents to us on October 12 and defendants refused. The issue being addressed was not the propriety of the defendants' conduct on a discovery matter but whether Regulation C should be considered by the Court.

What we said in our filings with the Court was accurate. We certainly did not intend to imply nor do we think we did imply that defendants let us travel to D.C. without first advising us that production would not be made and, if that is the impression conveyed, it was done so mistakenly and we apologize. However, your November 2 letter to me is not accurate in the sense of what I acknowledged to you (as addressed above) and does not tell the whole story. In our view, the salient facts are:

1. Ms. Alaniz and I were given Secret level security clearances by the CIA in 1997 for the purposes of representing our clients in their dispute with the CIA. At the time the clearances were granted, the CIA representative showed Ms. Alaniz and me several documents which, while not bearing classification designation, apparently were considered by the CIA to be classified.

2. On two subsequent occasions (November 6, 1997 and August 3, 1998) I was allowed to view documents related to this case (a very few, I might add) at a CIA facility in the Washington D.C. area. These documents were not marked as classified but apparently are considered classified by the CIA.

3. After defendants filed their current motion to dismiss, we requested production of the documents referred to by Mr. McNair in his declaration and we noted Mr. McNair's deposition. Defendants produced several redacted regulations (referred to as Regulations A and B) and permitted us to depose Mr. McNair on September 7, 2000.

4. When Mr. McNair disclosed during deposition the existence of additional PL-110 regulations (classified at the Secret level), I asked about obtaining these additional PL-110 regulations. Mr. McNair responded that he believed that our security clearances were no longer valid, having been granted only for the administrative proceedings. Later you also told me as a basis for not producing documents to us that you thought our security clearances were no longer valid.

5. By letter of September 29, 2000 (copy attached), I wrote you to follow up on one or more telephone conversations we had previously had about our request to review documents at the CIA. We had requested to see both the documents that I had already been shown and my notes about those documents, which the CIA retained, as well as the additional PL-110 regulations about which Mr. McNair testified. Since you had insisted that these requests be formalized, we had, provided to you on September 25, 2000 with Plaintiffs' Second Requests for Production and provided you on September 29, 2000 with Plaintiffs' Third Requests for Production.

6. My letter of September 29 advised you (as I had also advised in earlier conversations) that Betsy and I were going to be in Washington D.C. for other business during the week of October 9 but that we were going to go a day early for the express purpose of working on

this case and reviewing CIA documents. During our conversation, I also explained that we were doing this to save expenses. As we have advised you before, Perkins Coie has expended in excess of $600,000 on this pro bono case. I further explained that, with regard to the documents I had been shown before by the CIA, I wanted to refresh myself as to the contents of the documents and, in addition, I reminded you that Betsy had not seen some of the documents and I wanted her reaction to them. You indicated that even with a formal discovery request you doubted that the Agency would produce anything at all, including the documents previously reviewed. I urged that defendants reconsider that position, stressing that there could be no rational basis to denying us access to documents already shown to me. As I recall, you agreed to discuss the matter further with the Agency.

7. On Tuesday, October 10, you communicated to us the CIA's refusal to produce additional documents or even allow us to review the documents I had already seen twice or my notes.

8. On Wednesday, October 11, Betsy and I traveled to Washington D.C. as planned for the express purpose of working on this case on Thursday, October 12, the day before our partner meeting began. Our tickets for this travel were purchased on September 12. Our activities on October 12 were related solely to this case and included meetings with Members of Congress and the staff of the House Permanent Select Committee on Intelligence. We were available on the 12th to review documents at the CIA but were not permitted to do so. Had defendants wished to mitigate the unfair surprise of dropping Regulation C on us in your October 17 reply brief, you could have made it available to us

October 12. As was later explained (see below), you did not because the Agency contends we did not have a "need to know."

9. We discussed the defendants' October 10 refusal to produce any documents to us at a Rule 37 conference on October 19. During that conference, Mr. Pines of the CIA, who was participating by phone, explained that the refusal to produce the documents at the classified facility was *not* due to our security clearances no longer being valid (he confirmed that they in fact remain valid), but because, according to the CIA, we no longer had a "need to know." When I asked how we could have a "need to know" during the administrative proceeding but not now, I understood Mr. Pines to say that a "need to know" is determined strictly from the government's perspective and that viewed as such the government's interests were not served by allowing us access to documents at this time. I then attempted to explain that in our view national security interests were served by the appropriate adjudication of defector disputes, including those that raised Constitutional issues, through a process that protected classified information and allowed the issues to be resolved on their merits and that allowing us continued access to relevant documents furthered this purpose. Mr. Pines disagreed with this, but I was unable to understand his logic.

We do not think it likely that the Court has gotten a misimpression of defendants' conduct in denying us access to documents in Washington D.C. on October 12. As is explained above, the issue in the current motion is whether Regulation C should be considered by the Court. However, since you have demanded that we

clarify the situation, we intend to do so by submitting a copy of your letter and this response to the Court.

We trust you will let us know if you have any further concerns.

Sincerely,

/s/ STEVEN W. HALE
STEVEN W. HALE

SWH:ck
Enclosures

cc: Betsy Alaniz, Esq.

(6)

Supreme Court, U.S.
FILED
AUG 3 1 2004
OFFICE OF THE CLERK

No. 03-1395

In the Supreme Court of the United States

GEORGE J. TENET, INDIVIDUALLY, JOHN E. MCLAUGHLIN, ACTING DIRECTOR OF CENTRAL INTELLIGENCE AND ACTING DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND UNITED STATES OF AMERICA, PETITIONERS

v.

JOHN DOE AND JANE DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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JOHN L. MCPHERSON
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QUESTION PRESENTED

Whether *Totten* v. *United States*, 92 U.S. 105 (1876), bars a district court from considering respondents' due process and tort claims that the Central Intelligence Agency (CIA) has wrongfully refused to keep its alleged promise to provide them with life-time financial assistance in exchange for their alleged espionage services to the CIA.

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In the Supreme Court of the United States

No. 03-1395

GEORGE J. TENET, INDIVIDUALLY, JOHN E. MCLAUGHLIN, ACTING DIRECTOR OF CENTRAL INTELLIGENCE AND ACTING DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND UNITED STATES OF AMERICA, PETITIONERS

v.

JOHN DOE AND JANE DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-64a) is reported at 329 F.3d 1135. The June 7, 2000, opinion of the district court (Pet. App. 95a-116a) is reported at 99 F. Supp. 2d 1284. The January 22, 2001, opinion of the district court (Pet. App. 85a-94a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2003. A petition for rehearing was denied on January 7, 2004 (Pet. App. 65a-66a). The petition for a writ of certiorari was filed on April 6, 2004, and was granted on June 28, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. "In the world of espionage, there are two kinds of spies. They both risk exposure, arrest, and sometimes their lives in the clandestine search for information to forewarn the United States. They are called case officers and agents." Admiral Stansfield Turner, *Secrecy and Democracy: The CIA in Transition* 48 (1985). "The case officer is always a [Central Intelligence Agency (CIA)] person, usually an American, usually overseas. He is the contact between CIA Headquarters and the agents who do the actual spying. Agents generally are foreigners who are willing to spy for the United States." *Ibid.* "Some [agents] do so for money, some because they prefer our ideology to that of their own countries, some because they carry a grudge against their government, some for adventure, and some because of a personal friendship with the case officer who recruits them." *Ibid.* This case involves the latter category of spies.

It has long been established that such spies have no entitlement to sue to enforce their secret contracts. *Totten* v. *United States*, 92 U.S. 105 (1876). Indeed, it is understood that the government that procures their services may deny any relationship in the event the spying arrangement becomes exposed or suspected. See pp. 18-19, *infra*. Nevertheless, respondents, using the fictitious names John and Jane Doe, filed suit in the United States District Court for the Western District of Washington against the United States and the Director of Central Intelligence (DCI) in his individual and official capacity. The Second Amended Complaint alleges the following facts which, "for reasons of national security," the United States to date has neither confirmed nor denied. Pet. App. 2a. The CIA, through

its case officers, recruited respondents, husband and wife, to "conduct espionage for the United States" in a foreign country that was "then considered to be an enemy of the United States." *Id.* at 121a, 122a. Respondents agreed to spy for the CIA in exchange for a promise by the CIA to "arrange for travel to the United States and ensure financial and personal security for life." *Id.* at 122a. Respondents thereafter "carr[ied] out their end of the bargain" by performing "highly dangerous and valuable [espionage] assignments" abroad, and they ultimately defected to the United States and became United States citizens. *Id.* at 123a, 124a. John Doe subsequently obtained professional employment using a false name and resume. *Id.* at 124a. "As John Doe's salary increased over time, the [CIA's] living stipend decreased and eventually was discontinued." *Ibid.* A number of years later, John Doe lost his job due to a corporate merger and since has been unable to find employment. *Id.* at 125a.

The complaint also alleges that, if the CIA is "not compelled to resume assistance," respondents "will soon have no other choice than to leave the United States" and live in a foreign country where there is a risk that they will be recognized and punished as a result of their espionage services for the CIA. Pet. App. 126a-128a. The complaint also alleges that respondents have unsuccessfully contacted the CIA for assistance. *Id.* at 129a-136a. The complaint seeks an injunction ordering the CIA to pay monthly "financial support" to respondents pending further administrative review by the CIA of their claims; a declaratory judgment specifying the kind of administrative review that would be required; and an order of mandamus that would compel the CIA to "provide for [respondents']

basic needs" and to adopt regulations for administrative review of their claims. *Id.* at 138a-142a.

2. The government moved to dismiss the complaint because respondents' claims were barred by *Totten*, *supra*, which held that a suit against the United States could not be maintained to enforce the terms of an alleged agreement to perform espionage services. The Court in *Totten* concluded that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." 92 U.S. at 107.

The district court denied the government's motion in part, holding that *Totten* does not extend to plaintiffs' estoppel and constitutional claims. Pet. App. 104a-107a. The court granted the government's motion to dismiss respondents' equal protection claim, *id.* at 113a-114a, and the court also denied respondents' motion for a preliminary injunction. *Id.* at 115a.

The government then moved for summary judgment and renewed its motion to dismiss, attaching a declaration of William H. McNair, the Information Review Officer for the CIA's Directorate of Operations, which is the Agency's Clandestine Service that conducts foreign intelligence and counterintelligence activities. Pet. App. 143a-148a. In the affidavit, McNair explained that "any Agency response to the [complaint's] factual assertions * * *, whether to either confirm or deny the allegations contained therein, would be classified information and could not be filed in open court." *Id.* at 147a.

The district court denied summary judgment. Pet. App. 85a-94a. The district court then certified its orders for interlocutory appeal, and stayed further

proceedings pending disposition of the government's appeal. *Id.* at 79a-84a. The court of appeals granted the government's appeal and denied respondents' cross-petition to appeal pursuant to 28 U.S.C. 1292(b). Pet. App. 77a-78a.

3. A divided panel of the court of appeals affirmed. Pet. App. 1a-64a.

a. The court held that *Totten* does not bar judicial review of respondents' claims at the outset because their claims, in the court's view, "do not arise out of an implied or express contract." Pet. App. 18a. The court believed that *Totten* is not a "blanket prohibition on suits arising out of acts of espionage," but "is instead simply a holding concerning contract law." *Id.* at 21a. Thus, the court found that *Totten* holds only that, as a matter of contract law, a plaintiff could not recover on a claim for a secret contract for espionage services because bringing the action amounted to a breach of the contract that would necessarily preclude recovery. The court found that, "[f]or two reasons, the contractual holding of *Totten* is not applicable here." *Id.* at 22a. First, the court reasoned that respondents seek "to compel fair process and application of substantive law to their claims within the Central Intelligence Agency's . . . internal administrative process." *Ibid.* The court stated that "a fair internal process could presumably proceed in accordance with the secrecy implicit in an agreement to engage in espionage." *Ibid.*

Second, the court found that, "[h]ere, [respondents] have so far proceeded in a manner that has not breached the agreement" by "fil[ing] suit under fictitious names and reveal[ing] only minimal, nonidentifying details in their complaint." Pet. App. 22a. The court further reasoned that, "[w]ith court and government cooperation, it may be possible to continue the

suit in a manner that avoids public exposure of any secret information." *Id.* at 23a.

The court of appeals also concluded that *Totten*'s holding that public policy forbids a suit that would inevitably reveal information the law regards as secret "has flowered into the state secrets doctrine" as articulated in *United States* v. *Reynolds*, 345 U.S. 1 (1953). Pet. App. 25a. The court then held that "*Totten* permits dismissal of cases in which it is asserted that the very subject matter is a state secret only *after* complying with the formalities and court investigation requirements that have developed since *Totten* within the framework of the state secrets doctrine." *Id.* at 27a; *id.* at 29a ("*Totten* is applicable to the case before us only as applied through the prism of current state secrets doctrine."). The court observed that the CIA "has not complied here with the formalities essential to invocation of the state secrets privilege," *i.e.*, a formal claim of privilege by the DCI after personal review of the matter. *Id.* at 31a. The court held that CIA's non-compliance with those formalities "is reason enough to affirm the district court's refusal to dismiss this case." *Ibid.*

The court of appeals finally proceeded to "provide some guidance concerning the handling of [respondents'] claims should the state secrets privilege be invoked" by the CIA on remand. Pet. App. 31a. The court instructed the district court to "make every effort to ascertain whether the claims in question can be adjudicated while protecting the national security interests asserted." *Id.* at 33a. The court observed that "the district court might conclude that the Agency has not provided *any* basis for concluding that national security

would be jeopardized by the revelation of the existence of a relationship with [respondents]." *Id.* at 36a.[1]

b. Judge Tallman dissented. Pet. App. 39a-64a. He explained that "*Totten* holds that claims brought by secret agents against the government are non-justiciable," and that, "[f]ar from modifying *Totten*, the Court's opinion in *Reynolds* reaffirms *Totten's* jurisdictional bar." *Id.* at 39a, 40a.

4. The court of appeals denied rehearing and rehearing en banc. Pet. App. 65a-66a. Judge Kleinfeld, joined by five other active judges, dissented from the denial of rehearing. *Id.* at 66a-76a. He explained that "[t]he panel's contention that the purposes of *Totten* can be served by the CIA asserting the state-secrets privilege, which would then permit in camera inspection of papers by the district court and so forth, leaves out the most important purpose of all: to keep the whole engagement utterly and entirely secret." *Id.* at 71a.

SUMMARY OF ARGUMENT

Nearly 130 years ago, *Totten* v. *United States*, 92 U.S. 105, 106-107 (1876), held that a former spy could not sue the United States for breach of a contract for espionage services performed on behalf of the

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[1] The government also argued below that the filing of the claims in district court was precluded by the Tucker Act, 28 U.S.C. 1491(a)(1), which provides for exclusive jurisdiction in the Court of Federal Claims for claims in excess of $10,000 "founded * * * upon any express or implied contract with the United States." The district court rejected that contention, Pet. App. 107a, and the court of appeals held that summary judgment was not proper on the issue whether respondents' due process claims arose from a statute or the CIA's regulations, because "further proceedings, including discovery," may provide support for a due process interest that exists independent of a contract. *Id.* at 15a. The United States has not sought review of that holding. See Pet. 8 n.2.

President. The fundamental underpinning of that decision is the principle that such a suit inevitably would lead to the disclosure of the existence of the agreement, contrary to both the inherently secret nature of the agreement and the Nation's overriding interests in effective national security and foreign relations. *Totten* also reflects the principle that judicial adjudication of claims by alleged former spies who are dissatisfied with the terms of an espionage relationship would severely intrude on the constitutional role of the Executive Branch to conduct espionage activities and to safeguard information whose disclosure would harm the Nation's interests. Those paramount considerations give rise to *Totten*'s categorical and jurisdictional bar to suits alleging that the CIA has wrongfully failed to compensate a spy for his espionage activities or otherwise violated the terms of an espionage agreement.

Respondents' suit should have been dismissed under the rule of *Totten*. The suit alleges the existence of an espionage relationship and alleges that the CIA failed to keep its promises to respondents. Although respondents' suit is framed in estoppel and constitutional terms, all of respondents' claims are premised on the existence of an espionage agreement—an agreement that necessarily included an implicit term that the agreement was not judicially enforceable because it would forever remain secret. The suit conflicts with the secret nature of the agreement, because the CIA cannot answer any of respondents' allegations without confirming or denying the existence of an espionage relationship and revealing information that should remain secret.

The Ninth Circuit critically erred in holding that *Totten*'s categorical bar has been superseded by the state secrets privilege articulated in *United States* v. *Reynolds*, 345 U.S. 1 (1953). This Court in *Reynolds* confirmed that *Totten* continues to pose a jurisdictional bar "where the very subject matter of the action [is] a contract to perform espionage." *Id.* at 11 n.26. And since *Reynolds*, the Court has viewed *Totten* as imposing a jurisdictional bar that "forbids the maintenance of any suit" to recover on claims that would inevitably lead to the disclosure of classified information. *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146 (1981) (quoting *Totten*, 92 U.S. at 107). *Reynolds* also makes abundantly clear that in such cases the issue of a state secrets privilege is not to be litigated. Rather, "*[t]he action [i]s dismissed on the pleadings without ever reaching the question of evidence.*" 345 U.S. at 11 n.26. (emphasis added). There is accordingly no basis for requiring the DCI in every case to demonstrate that disclosure of the existence of an espionage agreement risks harm to our national security and foreign relations.

ARGUMENT

TOTTEN V. *UNITED STATES* CATEGORICALLY BARS RESPONDENTS' SUIT

Respondents' suit seeks to force the CIA to provide them with life-time financial assistance in accordance with an alleged espionage relationship with the CIA and to provide them with internal administrative procedures that would govern their entitlement to such assistance. Pet. App. 138a-142a. The Court's decision in *Totten* v. *United States*, 92 U.S. 105 (1876), categorically bars this suit because respondents' claims cannot proceed without disclosing facts that would damage national security: whether respondents actually had an espionage relationship with the CIA and, if so, the details of that relationship.

A. *Totten* Holds A Court Cannot Consider Claims That The United States Has Wrongfully Refused To Pay For Espionage Services

Totten involved an action brought by the administrator of the estate of William A. Lloyd to recover compensation for espionage services behind Confederate lines that President Lincoln contracted for in 1861 during the Civil War. 92 U.S. at 105. The Court expressed its "objection" to the suit as inconsistent with the secret nature of the contract:

> The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter.

Id. at 106. The court concluded that the secret "condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties." *Ibid.*

The Court further stated that the alleged failure to compensate a spy consistent with prior promises was not susceptible to judicial resolution. Such litigation presupposes a fact that would be confidential if true and therefore is not a proper subject of litigation: namely, the fact of the prior promise and the details of the secret relationship. Adjudication of such disputes not only would prevent effective foreign relations, but also would interfere with the government's ability to con-

tract for espionage services in the first place. "A secret service, with liability to publicity in this way, would be impossible." 92 U.S. at 107. The Court thus articulated the "general principle[] that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." *Ibid.*

B. *Totten*'s Categorical Rule Is Compelled By The Government's Paramount Interest In Conducting Espionage Activities In Secret

1. *Espionage Activities Are Essential To National Security*

The foreign intelligence and espionage operations of the United States are designed to acquire secrets of foreign countries in order to protect the life and liberty of United States' citizens. "Intelligence is information. Specifically, it is information about an adversary that is useful in dealing with him." George J.A. O'Toole, *Honorable Treachery: A History of U.S. Intelligence, Espionage, and Covert Action from the American Revolution to the CIA* 1 (1991) (O'Toole). Thus, "the two main functions of traditional intelligence" are "[a]ssessing an enemy or potential enemy's military capacity" and "the discovery of an enemy's intentions." Thomas Powers, *The Man Who Kept The Secrets: Richard Helms & the CIA* at vi (1979) (Powers).

The government's ability to carry out such operations is essential to national security and is an inherent attribute of national sovereignty. "Intelligence services do not exist in a vacuum. A nation with neither an army nor enemies does not have much need for spies, but once it has both, an intelligence service is bound to

follow." Powers vi. "Secret intelligence is as old as warfare and diplomacy. * * * Both foreign policy in peacetime and command decision in wartime are driven by intelligence, much of which has necessarily been obtained by covert means." O'Toole 1; accord *id.* at 4 ("[S]ecret intelligence * * * has * * * been an instrument of American foreign policy since the birth of the Republic."). As this Court observed over twenty years ago:

> Every major nation in the world has an intelligence service. Whatever fairly may be said about some of its past activities, the CIA (or its predecessor the Office of Strategic Services) is an agency thought by every President since Franklin D. Roosevelt to be essential to the security of the United States and—in a sense—the free world. It is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence.

Snepp v. *United States*, 444 U.S. 507, 512 n.7 (1980) (per curiam).

The importance of successful foreign intelligence has only increased over time. The Nation faces on-going threats not only from foreign sovereign adversaries, but also from terrorists who plan attacks both here and abroad against United States interests and citizens. Vital to the government's success in penetrating terrorist cells and gathering intelligence about an enemy's capabilities and intentions is the use of human intelligence sources. See, *e.g.*, National Comm'n on Terrorist Attacks upon the U.S., *The 9/11 Commission Report* 415 (2004) ("Rebuilding the analytic and human intelligence collection capabilities of the CIA should be a full-

time effort."); S. Rep No. 301, 108th Cong., 2d Sess. 24-26, 34, 269-271, 355, 391 (2004) (discussing need for human intelligence in dealing with Iraq); accord John Keegan, *Intelligence in War: Knowledge of the Enemy from Napoleon to Al-Qaeda* 316-319 (2003) (Keegan).

2. *Espionage Relationships Are Necessarily Secret*

a. The Nation's history reflects the paramount importance of secrecy in all aspects of foreign intelligence operations, including the very fact of the relationship's existence. Since the earliest days of the Republic, secrecy has been recognized as crucial to the successful gathering of intelligence. In a letter written on July 26, 1777, issuing orders for an intelligence mission, General Washington instructed Colonel Elias Dayton:

> The necessity of procuring good intelligence is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprises of the kind, and for want of it, they are generally defeated, however well planned and promising a favourable issue.

8 *The Writings of George Washington from the Original Manuscript Sources* 478-479 (John C. Fitzpatrick ed., 1933) (Fitzpatrick) (bracketed material omitted); see *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (noting the "[s]ecrecy in respect of information gathered" by the President's confidential sources of information). Two years later, General Washington admonished Benjamin Tallmadge, his Chief of Intelligence, that the "name and business" of one of his spies "should be kept profoundly secret, otherwise we not only lose the benefits desired from it, but may

subject him to some unhappy fate." 15 Fitzpatrick 326, 327 (1936).

The Continental Congress too "was quick to grasp the need for foreign intelligence during the Revolutionary War," and on November 29, 1775, "it created the Committee of Secret Correspondence, the distant ancestor of today's CIA, 'for the sole purpose of Corresponding with our friends in Great Britain, Ireland and other parts of the world.'" Christopher Andrew, *For the President's Eyes Only: Secret Intelligence and the American Presidency from Washington to Bush* 7 (1995) (Andrew). Similarly, at the conclusion of the Revolutionary War, protecting sensitive intelligence sources was an immediate institutional priority for the new American nation, still threatened by foreign powers. The Continental Congress classified the identities of intelligence sources and operations to protect them from harmful disclosure. Edward F. Sayle, *The Historical Underpinning of the U.S. Intelligence Community*, 1 Int'l J. of Intell. & Counterintell. 5 (1986); Central Intelligence Agency, *Intelligence in the War of Independence* 26-27 (1976). The Federalist Papers also recognize that successful intelligence gathering depends on the ability to shield information about such activity from public disclosure. The Federalist No. 64, at 392 (John Jay) (Clinton Rossiter ed., 1961) ("[T]here doubtless are many [sources] * * * who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly.").

"American secret foreign intelligence activities received official sanction on July 1, 1790, when Congress appropriated funds to pay 'persons to serve the United States in foreign parts.'" O'Toole 95. "Thus was born the president's Contingent Fund for Foreign Intercourse, known informally as the Secret Service fund, which not only provided the wherewithal for foreign covert operations, but also represented Congress's tacit recognition that some of the business of the executive branch must be done in secret." *Ibid.*; accord Andrew 11 (observing that the Secret Service Fund was acknowledged by the Senate as "for spies"). "Congress required the President to certify what sum he had spent, but allowed him to conceal both the purposes and recipients of payments from the fund." *Ibid.*; see also *President James K. Polk's Message to the House of Representatives*, 6 A Comp. of the Messages and Papers of the Presidents 2281, 2285 (Apr. 20, 1846) ("The experience of every nation on earth has demonstrated that emergencies may arise in which it becomes absolutely necessary for the public safety or the public good to make expenditures the very object of which would be defeated by publicity. * * * In no nation is the application of such sums ever made public."). The Central Intelligence Agency Act of 1949 continues to vest the CIA with broad authority to conduct espionage activities through *secret* compensation. 50 U.S.C. 403j(a) and (b).

b. The United States's ability to conduct successful foreign intelligence activities in support of its national security, counterterrorist, and foreign policy objectives depends on maintaining the secrecy of its espionage activities. At "the heart of all intelligence operations" is the CIA's sources and methods of intelligence, particularly those relating to spies. *CIA* v. *Sims*, 471 U.S. 159, 167 (1985). "Obviously, such sources and methods must be protected by a cloak of secrecy if they are to continue to supply needed intelligence." O'Toole 1; accord Keegan 5. Secrecy means "secret from inception to eternity." Powers 102 (attributing statement to sen-

ior CIA official Lyman Kirkpatrick). Thus, "even after the intelligence itself has long since ceased to be of anything but historical interest, governments tend to hold secret the means used to acquire it." O'Toole 1. President Eisenhower thus expressed the essence of intelligence as a secret endeavor, in a May 11, 1960, press conference after the Soviet Union shot down an American U-2 spy plane:

> [I]ntelligence-gathering activities * * * have a special and secret character. * * * They are secret because they must circumvent measures designed by other countries to protect secrecy of military preparations. * * * These activities have their own rules and methods of concealment which seek to mislead and obscure * * * . It is a distasteful but vital necessity.

The President's News Conference of May 11, 1960, Pub. Papers 403-404 (1960-1961).

Clandestine intelligence operations accordingly demand special protection to ensure that intelligence sources are not compromised, that diplomatic policies are not embarrassing to the United States, and that the CIA can maintain the ability to use its secret tradecraft methods to carry out espionage activities. Inadequate protection of such information would render the CIA "virtually impotent." *CIA* v. *Sims*, 471 U.S. at 170; see *id.* at 175 ("[F]orced disclosure of the identities of [the CIA's] intelligence sources could well have a devastating impact on the Agency's ability to carry out its mission.").

Specifically, secrecy in all aspects of the CIA's espionage activities is necessary in order to protect the lives of the spies as well as the CIA employees who recruit them. "The continued availability of [intelligence]

sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger the[ir] personal safety." *Snepp*, 444 U.S. at 512. "Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.'" *CIA* v. *Sims*, 471 U.S. at 175. Similarly, disclosure of the CIA's sources and methods would, at a minimum, "endanger[] * * * the security of CIA operational assets—funding arrangements, the location of safehouses, proprietary companies, techniques of cover, and so on." Powers 102. Such disclosure would also endanger "something much more important: that public invisibility without which an intelligence agency cannot inspire confidence in those who trust it with their lives, their fortunes, and their sacred honor; and without which it cannot conduct the sort of operations no nation can undertake openly." *Ibid.* This Court accordingly has recognized that the CIA "has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *CIA* v. *Sims*, 471 U.S. at 175 (quoting *Snepp* v. *United States*, 444 U.S. at 509 n.3); accord *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988).

3. *The Secrecy Implicit In An Espionage Relationship Forecloses Judicial Resolution Of A Suit Seeking Redress For The CIA's Alleged Wrongful Refusal To Compensate A Spy*

The practical necessity and overriding importance of maintaining secrecy in all matters respecting the recruitment, maintenance, and compensation of spies has led to the long-standing principle reflected in *Totten*

that contracts for espionage are inherently secret and are not a proper topic for public disclosure or any litigation. Inherent in all secret espionage relationships is the possibility that one party will deny any relationship with the other. Indeed, the classic understanding of espionage defines it as "an extraterritorial act of state for which the state was not responsible." Leslie S. Edmondson, *Espionage in Transnational Law*, 5 Vand. J. Transnat'l L. 434 (1972) (Edmondson). Consequently, governments traditionally have "disavowed knowledge of action by their espionage agents." Geoffrey B. Demarest, *Espionage in International Law*, 24 Denv. J. Int'l L. & Pol'y 321, 340 (1996) (Demarest); see Edmondson 445 ("Customary international rules governing the conduct of states in the aftermath of the discovery of espionage are few. * * * Protest and denial seem to remain the most accepted ritual."). Accordingly, "[a]lthough all States constantly or occasionally send spies abroad, and although it is not considered wrong morally, politically, or legally to do so, such agents have, of course, no recognised position whatever according to International Law, since they are not official agents of states for the purpose of international relations." 1 Lassa F.L. Oppenheim, *International Law: A Treatise* § 455, at 862 (H. Lauterpecht ed., 8th ed. 1955) (Oppenheim).[2]

For those reasons, alleged spies lack legal protections and remedies for their espionage activities. "A spy cannot legally excuse himself by pleading that he only

[2] The status of a spy under international law is particularly anomalous because although the law of nations appears to at least tolerate the sending of spies, the domestic laws of almost every nation prohibit spying directed at that nation, and captured spies are subject to denial by the sending state and are treated most severely by the offended nation. Demarest 331, 338-339.

executed the orders of his Government, and the latter will never interfere, since it cannot officially confess to having commissioned a spy." Oppenheim 862. A captured spy is thus "without [the law] to the extent that he could claim few rules to protect him and no state to acknowledge and defend him." Maxwell Cohen, *Espionage and Immunity—Some Recent Problems and Developments*, 25 Brit. Y.B. Int'l L. 404 (1948); accord Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 Am. J. Int'l L. 53, 70 (1984) ("For acts of espionage, a 'true' spy * * * is himself responsible: he is out in the cold by himself and the sending state will most likely disavow any knowledge of him.").[3]

As the possibility of denial is inherent in and vital to the relationship, a party to an alleged *secret* agreement for espionage has no basis to demand an adjudication premised on the existence of that agreement or that they have been arbitrarily deprived of their day in court by a policy of government secrecy. That type of agreement necessarily forecloses the ability of an alleged spy to sue in court to enforce the agreement, because it is an inherent aspect of the secret relationship they entered into that the contracting government

[3] This harsh reality was evident at the time this Court decided *Totten*. President Abraham Lincoln reflected on the isolating risks of espionage when, on May 28, 1863, he sent a Methodist minister who was serving in the Union Army into Confederate territory to make contact with members of the Southern Methodist Church. "Such a mission as he promises I think promises good, if it were free from difficulties, which I fear it can not be. First, he can not go with any government authority whatever. This is absolute and imperative. Secondly, if he goes without authority, he takes a great deal of personal risk—he may be condemned, and executed as a spy." Stephen F. Knott, *Secret and Sanctioned: Covert Operations and the American Presidency* 147 (1996).

can refuse to confirm or deny the relationship's existence and has the sole discretion to determine whether and what type of redress is appropriate. For instance, assuming respondents' allegations to be true and that their espionage activities had been detected by their government, then a Cold War enemy of the United States, the CIA properly could have refused to confirm or deny the existence of any relationship with respondents. The secrecy inherent in the relationship entitles the CIA, *a fortiori*, to refuse to confirm or deny the existence of the relationship in a suit by respondents alleging the CIA failed to provide them with adequate compensation. The suit is implicitly foreclosed by the very nature of the secret agreement.

That lack of legal protection is inherent in the relationship from the CIA's perspective as well. Given the utterly secret nature of the espionage agreement, the CIA likewise has no judicial means of seeking compensation or specific performance in the many instances where a spy fails to fulfill a promise to provide truthful information. See, *e.g.* Leo D. Carl, *The CIA Insider's Dictionary of US and Foreign Intelligence, Counterintelligence & Tradecraft* 205 (1996) ("fabricator: tradecraft jargon for an ostensible agent who furnishes notional information for financial gain."); S. Rep No. 301, *supra*, at 161 (describing fabricator who provided unreliable information regarding Iraqi government). The relationship is both entirely secret and entirely outside the law, and its terms are not specifically enforceable through legal means by either side. Rather, the very nature of the endeavor mandates that both parties are not at liberty to file a public grievance alleging that an espionage relationship existed between them. As *Totten* observed, "[b]oth *employer* and *agent*

must have understood that the lips of the other were to be for ever sealed." 92 U.S. at 106 (emphasis added).

Moreover, applying *Totten* to force individuals to "look for their compensation" from "the department employing them" (*Totten*, 92 U.S. at 107) does not strip human intelligence sources of all potential remedies. For instance, sources can attempt to negotiate the up-front payments of compensation, and they can raise their disputes with the CIA's Office of Inspector General. Finally, because human sources are essential to collecting intelligence, the CIA has an obvious incentive to preserve its reputation of being fair and of honoring commitments to its sources. Pet. App. 75a (Kleinfeld, J., dissenting).

C. Judicial Adjudication Of Suits Covered By *Totten* Would Interfere With The Constitutional Role Of The Executive Branch To Safeguard National Security

Totten also reflects the broader principle that certain matters touching upon foreign affairs and national security are not appropriate for judicial resolution because they are committed to the discretion of the Executive Branch. "Implicit in the Court's public policy holding [of *Totten*] is an understanding that fundamental principles of separation of powers prohibit judicial review of secret contracts entered into by the Executive Branch in its role as guardian of national security." Pet. App. 41a (Tallman, J., dissenting); see generally *Baker* v. *Carr*, 369 U.S. 186, 211-217 (1962). The President is "vested" with the "executive Power" as the head of the Executive Branch, and is also the "Commander in Chief of the Army and Navy of the United States." U.S. Const. Art. II, § 1, Cl. 1 and § 2, Cl. 1. Those constitutional grants of power include the executive power to

conduct espionage activities and to safeguard confidential information regarding those activities. Judicial adjudication of suits such as respondents' would interfere with the Executive Branch's authority not only to conduct foreign intelligence operations but also to determine that non-disclosure of its espionage relationships best serves the national security and foreign policy interests of the country.

1. A suit that would permit an alleged spy to prove the existence and the details of an espionage relationship with the CIA would be an inappropriate intrusion into the Executive Branch's discretion to recruit, maintain, compensate, and terminate spies, all under a cloak of secrecy. Respondents' suit well illustrates the point. It seeks a permanent injunction ordering the CIA to provide respondents with a specific level of financial support, Pet. App. 138a, despite the fact that, for well over two centuries, the Executive Branch has compensated spies in utter secrecy. See, pp. 14-15, *supra*.

Respondent's suit also seeks judicial review of executive judgments that strike at the core of the President's constitutional and historical role of conducting espionage activities without public scrutiny. The complaint seeks a judicial adjudication of the propriety of the CIA's alleged promises to respondents in order to induce them to spy on behalf of the United States. Pet. App. 121a-125a. The complaint also seeks to have a district court determine that the CIA ha[s] created a special relationship with [respondents]" such that the CIA is "obligated by law to provide for [respondents'] basic needs and protect [them] from deprivations of liberty." *Id.* at 135a. And the complaint seeks a judicial determination ordering, in elaborate detail, that the CIA adopt procedures and regulations to adjudicate "defector grievances." *Id.* at 138a-139a.

Those judgments, however, are constitutionally entrusted to the Executive Branch, and "are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); see also *Egan*, 484 U.S. at 530 ("[U]nless Congress has specifically provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."); The Federalist No. 64, *supra*, at 393 (observing that the President "will be able to manage the business of intelligence in such manner as prudence may suggest"). Litigation of claims such as respondents' would embroil the judiciary in the conduct of clandestine human intelligence operations, including the extremely sensitive and secret relationship between the agent and the case officer, who is expert in recruiting human intelligence sources. That relationship—including the recruitment of the spy and the maintenance of the relationship—would be difficult if not impossible to maintain if it were subject to judicial oversight, even years later. Likewise, the decision as to what kinds of internal compensation procedures to promise and provide are matters of executive discretion involving considerations of the need for the information and the likelihood that such assurances would be material. They are not inquiries subject to judicially-manageable standards.

As this Court accordingly observed in *Totten*, the extent of any remedy for an alleged spy is a matter uniquely for the Executive Branch. Such individuals accordingly "must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that

fund may award." 92 U.S. at 107; see also Stephen F. Knott, *Secret and Sanctioned: Covert Operations and the American Presidency* 150 (1996) ("The Court's decision [in *Totten*] was a reflection of the prevailing sentiment within the American government over the need for conducting secret operations and for lodging the authority of them in the hands of the president.")

2. Suits that are premised on the existence of an espionage arrangement with the CIA also are incompatible with the protection of intelligence sources and methods that is constitutionally entrusted to the Executive Branch. The "constitutional investment of power in the President" necessarily includes the "authority to classify and control access to information bearing on national security." *Egan*, 484 U.S. at 527. That authority "exists quite apart from any explicit congressional grant." *Ibid.* In addition, Congress has specifically charged the DCI with protecting intelligence information from disclosure. See, *e.g.*, 50 U.S.C. 403-3(c)(7) (Supp. 2000 & Supp. I 2001) (DCI shall "protect intelligence sources and methods from unauthorized disclosure"); 50 U.S.C. 403-3(d)(1)-(5) (authorizing DCI to collect human intelligence and perform other intelligence functions and duties concerning the national security); *CIA* v. *Sims*, 471 U.S. at 168-169 (Congress entrusted the CIA with "very broad" and "sweeping power" to protect "all sources of intelligence information from disclosure").

The Executive Branch has long since determined that effective foreign policy and intelligence gathering operations mandate the non-disclosure of the existence of any espionage relationship, and *a fortiori*, the non-disclosure of any details of the CIA's tradecraft

methods of espionage. The reason was articulated in *Totten*:

> If * * * an action against the government could be maintained * * * , whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service [of the espionage relationship] in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public.

92 U.S. at 106-107. Any judicial order that would permit a plaintiff to prove the existence of an espionage relationship and its details (or that would require the United States to either confirm or deny those facts) is inconsistent with the authority and responsibility of the Executive Branch to protect national security information.

D. *Totten* Governs Respondent's Estoppel And Constitutional Claims

1. Because respondents' suit arises out of, and depends upon, a secret fact—respondents' alleged arrangement with the CIA to perform espionage services—*Totten* requires the dismissal of the complaint. As Judge Kleinfeld's dissenting opinion explained:

> [Respondents'] case is factually indistinguishable from *Totten*. Like William Lloyd, [respondents allegedly] were engaged to provide secret services to the United States behind enemy lines. Like Lloyd, they [allegedly] served to the great benefit of the United States in circumstances that could have gotten them killed. And like Lloyd, they allegedly got stiffed by the government providing less com-

pensation than required by the contracts when the time came for the United States to pay up.

Pet. App. 69a. And like Lloyd, respondents are seeking a judicial order that would require an adjudication of whether respondents in fact had an espionage relationship, and if so, any extent to which that relationship imposes an obligation on the United States. Indeed, like Lloyd, respondents would not even have standing to sue unless such a relationship existed. Thus, like Lloyd's suit, respondents' suit is fundamentally at odds with the inherently secret and extralegal nature of the agreement, and would interfere with the government's ability to conduct espionage relationships while maintaining effective foreign relations. Like Lloyd, respondents have "no recognised position whatever according to International Law" or domestic law. Oppenheim 862. Respondents' alleged agreement with the CIA thus is no more judicially enforceable than Lloyd's alleged agreement with President Lincoln.

2. In refusing to dismiss the suit in this case, the court of appeals held that *Totten* does not require the dismissal of claims that did not seek enforcement of a *contract*. Pet. App. 21a-25a. The Court's holding and reasoning in *Totten*, however, extend beyond contractual claims and applies with the same force to other claims premised on an unenforceable and legally unrecognizable secret espionage relationship. The Court in *Totten* looked to the secret nature of the underlying relationship, emphasizing that "the employment and the service were to be equally concealed" and that "[t]he secrecy which such contracts impose precludes *any action* for their enforcement." *Totten*, 92 U.S. at 106, 107 (emphasis added); *id.* at 107 ("public policy forbids the maintenance of *any* suit in a court of justice")

(emphasis added). The Court that decided *Totten* certainly would not have entertained a tort suit for the tortious interference with an espionage contract, or any estoppel action that proceeded on the premise that a secret promise or contract, in fact, existed. Indeed, in light of the secret nature of espionage contracts, there is no meaningful difference between a contract action to enforce a secret contract and an estoppel action to enforce a secret promise.

Totten accordingly equally "extends to claims for tort or constitutional violations arising from the secret contractual relationship." Pet. App. 49a (Tallman, J., dissenting). "Whether it is called a plea for fairer process or a simple contract claim for damages, [respondents], like Totten's decedent, sue the government to obtain a remedy for its breach of an agreement to compensate them for intelligence services." *Id.* at 71a (Kleinfeld, J., dissenting). Thus, "the *Totten* doctrine applies to the facts of this case regardless of whether [respondents'] claim is based on a secret contract with the CIA or on other theories of relief that necessarily involve the disclosure of that secret relationship." *Id.* at 52a (Tallman, J., dissenting). The court of appeals' contrary reading of *Totten* would allow past or current spies (or individuals who imagine or falsely allege that they were spies) to circumvent *Totten* by artificially pleading contract claims as raising tort, estoppel, or constitutional claims.

Respondents cannot recover under any theory of relief absent proof of their alleged agreement to perform espionage services for the CIA. For instance, respondents' "claim based on theories of estoppel would require [them] to actually demonstrate a relationship with the CIA," "the very existence" of which is "a secret that cannot be disclosed, since disclosure of this

fact would inevitably 'compromise or embarrass our government in its public duties.'" Pet. App. 52a (Tallman, J., dissenting) (quoting *Totten*, 92 U.S. at 106). The same is true of respondents' due process claims that are allegedly based on a statute or regulation. Absent an alleged secret relationship between respondents and the CIA, respondents would not even have standing to seek a fair process and the CIA would owe no actionable duty to respondents. "That is, [respondents] would have to show that a relationship or an agreement existed between themselves and the CIA that would entitle them to seek relief under these specific statues and regulations for the benefits they now claim." *Id.* at 53a (Tallman, J., dissenting).

The court of appeals was manifestly wrong in asserting that a suit to compel the Agency to provide respondents with a "fair internal process" could comport with the secrecy implicit in respondents' alleged relationship with the CIA. Pet. App. 22a. A judicial order of that sort would necessarily be premised upon a finding that respondents were in fact spies entitled to a "fair internal process." *Ibid.* Indeed, the court explicitly acknowledged that "to make out their procedural due process claim, [respondents] *will need to demonstrate* * * * *that they had a relationship with the CIA that could potentially establish an entitlement to continued assistance or payments.*" *Id.* at 35a (emphasis added); accord *id.* at 37a (requiring district court to engage in an "evidentiary inquiry * * * * to determine *whether the alleged relationship with the CIA in fact existed*, and, if so, whether the resulting relationship gave rise to a legally cognizable property or liberty interest") (emphasis added). Under *Totten*, however, respondents could have had no legitimate expectation that their

alleged agreement with the CIA would give rise to legally enforceable rights.

In short, respondents' suit conflicts *in toto* with respondents' allegedly secret relationship with the United States and the public policy that suits by spies compromise national security and effective foreign relations. If anything, respondents' suit imposes even more of an intrusion on the Executive Branch's role in safeguarding national security than that imposed by William Lloyd's suit for compensation. As discussed, respondents seek not only a permanent injunction for financial support, but also a judicial determination of what internal procedures the CIA must have to adjudicate "defector grievances," Pet. App. 139a. Such matters are committed to the Executive Branch, see pp. 22-24, *supra*, and respondents' claims conflict with the secret nature of the agreement. Because any spy would know that such an espionage agreement would not be judicially enforceable, he may seek certain assurances about the extent to which the Agency will provide a fair process to review any dispute. But that aspect of the alleged agreement is no more subject to judicial review than the terms of payment.

E. *Reynolds* Does Not Supersede *Totten*

The Ninth Circuit concluded that the *Totten* doctrine has effectively been subsumed under the state secrets doctrine of *United States* v. *Reynolds*, 345 U.S. 1 (1953). The court of appeals thus held that *Totten* "has flowered into the state secrets doctrine of today," such that "*Totten* permits dismissal of cases in which it is asserted that the very subject matter is a state secret only *after* complying with the formalities and court investigation requirements that have developed since *Totten* within the framework of the state secrets

doctrine." Pet. App. 25a, 27a. That ruling is unsound both in principle and in practice.

1. ***The Ninth Circuit Erroneously Concluded That* Reynolds *Governs Suits Whose Subject Matter Involves An Agreement To Perform Espionage Services***

a. *Reynolds* was an action brought against the Air Force under the Federal Tort Claims Act, 28 U.S.C. 2674, in which the plaintiffs sought information relating to the crash of a military aircraft that had been engaged in testing secret electronic equipment. The Court held that the information was protected by "the privilege against revealing military secrets," *i.e.*, the state secrets privilege, which must be formally "lodged by the head of the department which has control over the matter, after actual consideration by that officer," and must be reviewed by the court to determine that "military secrets are at stake." 345 U.S. at 6, 8. 11. Nothing in that decision purports to overrule *Totten* or suggests that *Reynolds*, rather than *Totten*, governs suits by spies seeking redress for an alleged failure of the CIA to provide adequate compensation. The Ninth Circuit accordingly erred in deciding for itself that *Totten* had no continuing force by virtue of a later decision of this Court. See *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

b. In any event, the Court's decision in *Reynolds* itself refutes the notion that *Totten*'s categorical bar on suits such as respondents' lacks independent force. The Court in *Reynolds* cited *Totten* expressly, and differentiated it from an ordinary dispute in which the evidentiary state secrets privilege is necessary to protect information that might be relevant in resolving claims

otherwise susceptible to judicial resolution. As this Court explained, *Totten*, by contrast, was a case "where the very subject matter of the action, a contract to perform espionage, was a matter of state secret. The action was dismissed *on the pleadings without ever reaching the question of evidence*, since it was so obvious that the action should never prevail over the privilege." *Reynolds*, 345 U.S. at 11 n.26 (emphasis added). Contrary to the Ninth Circuit's reading, that passage makes eminently clear that *Totten* continues to set forth a *categorical* rule of dismissal for suits premised on a secret agreement and that formal invocation of the state secrets privilege is *not* required for suits covered by *Totten*.

Although this Court's decision in *Reynolds* remains important to the government and effectively serves its interests in the cases where there is a recognized cause of action, *Totten* remains essential in the distinct class of cases where recovery is incompatible with the very nature of the agreement that forms the basis for the plaintiff's claims for relief, *i.e.*, a clandestine agreement to provide espionage services. In that instance, a court can ascertain "on the pleadings" (*Reynolds*, 345 U.S. at 11 n.26) that the plaintiff's entitlement to any relief is premised on the existence of a secret agreement to perform espionage services. Thus, "*Reynolds* did not alter the long-standing rule announced in *Totten* barring judicial review where the very subject matter of the suit is a state secret." Pet. App. 44a (Tallman, J., dissenting). As Judge Tallman's dissent correctly explained:

> While *Totten* and *Reynolds* are closely related in that both protect a state secret from disclosure, the rules announced in those cases differ in subtle but

important respects. Most importantly, the state secrets privilege in *Reynolds* permits the government to withhold otherwise relevant discovery from a recognized cause of action (*e.g.*, [a Federal Tort Claims Act] case), while the *Totten* doctrine permits the dismissal of a lawsuit because it is non-justiciable before such evidentiary questions are ever reached.

Id. at 45a.

This Court's post-*Reynolds* decision in *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146 (1981), also reaffirms the continuing validity of the categorical rule set forth in *Totten*. In that case, the Court held that "whether or not the Navy has complied with [the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C)]" with respect to the storage of nuclear weapons at a Navy facility was "beyond judicial scrutiny," a "similar situation" to the one at issue in *Totten*. 454 U.S. at 146, 147. The Navy's obligation under the Act, the Court explained, was triggered by a proposal to store nuclear weapons. Because any such proposal would itself be classified information, the Court held that the suit, like the one in *Totten*, could not proceed. *Id.* at 146-147. And the Court reached that judgment despite the absence of a formal invocation of a state secrets privilege by the Navy.

2. ***Requiring The CIA To Assert The State Secrets Privilege With Respect To Specific Information Does Not Sufficiently Safeguard The CIA's Interests***

a. As discussed, the rule of *Totten* is compelled by the inherently secret nature of espionage agreements, and the decision prevents potentially devastating disclosures of national security information and the judiciary from reviewing what is a quintessentially core Executive Branch function. On a practical level, *Totten* also serves the national security mission of the CIA and other intelligence agencies. Since its inception over a century ago, the *Totten* doctrine has deterred lawsuits by individuals who have real or perceived grievances against the United States arising out of an alleged relationship for the performance of espionage. *Totten* also has greatly preserved the CIA's resources and prevented efforts at "graymail," *i.e.* attempts by individuals to induce the Agency to settle a case (or prevent a case from being filed) out of a concern that any effort to litigate the suit would reveal sensitive or classified information useful to our adversaries or that would compromise the Agency's clandestine operations. *Totten* significantly reduces the effectiveness of graymail by eliminating any judicial forum for those who would allege the existence of a secret arrangement.

The court of appeals' unprecedented holding that such suits are not barred at the outset and may proceed at least to the invocation of the state secrets privilege and even proceed to judgment runs the real risk that such lawsuits would substantially increase. Indeed, every stage in the litigation involves some risk of disclosure of sensitive information and accordingly some opportunity for graymail. In particular, the expected enormous publicity that may be generated by the assertion of a state secrets privilege by the DCI in any given case could well force the CIA to settle the case, regardless of its merits.

The Ninth Circuit's holding that this case could proceed unless and until the DCI successfully asserts the state secrets privilege significantly reduces the benefits to the CIA from *Totten*'s categorical bar of suits by spies arising out of their relationship with the CIA.

Only a categorical rule absolutely eliminates a judicial forum for graymail. The benefits to the CIA are in large measure lost if the CIA must undergo "full-fledged discovery" (Pet. App. 12a n.5) or become embroiled in a case-by-case battle over the propriety of asserting a state secrets privilege with respect to individual documents or pieces of information. Such a regime would also place an enormous burden on the DCI, whose attention would be diverted from the CIA's other pressing business to reviewing potentially every pleading filed by an alleged spy with a grievance against the agency. Cf. *Cheney* v. *United States Dist. Ct.*, 124 S. Ct. 2576, 2589 (2004) (declining to hold that the Vice President must invoke executive privilege before the district court considers separation of powers objection to discovery requests and reasoning that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.").

The personal burden on the DCI envisioned by the Ninth Circuit also is wholly unnecessary in suits like this that necessarily involve classified information. Even in a suit in which a plaintiff has entirely fabricated an alleged secret espionage relationship, the DCI would need to invoke the privilege to prevent the disclosure of classified information. See, pp. 35-36, *infra*.

At a more fundamental level, however, the Ninth Circuit's holding seriously misconceives *Totten*'s protection of the classified fact of whether the United States has contracted for espionage services. As discussed (pp. 27-29, *supra*), all of respondents' claims depend upon the existence of an extralegal espionage relationship whose very existence must "*for ever*"

remain secret. *Totten*, 92 U.S. at 106 (emphasis added). The possibility of a formal adjudication confirming the relationship is fundamentally inconsistent with the nature of the relationship and the bargain struck. The "most important purpose" served by the *Totten* rule is "to keep the whole engagement utterly and entirely secret." Pet. App. 71a (Kleinfeld, J., dissenting). "If a lawsuit is filed but some papers remain secret, that is not enough. An intelligent observer, knowing something of the events, can figure out from the barest indications in a lawsuit what it is all about." *Id.* at 72a. And knowing information about one spy—how he was recruited, the terms of the relationship, and representations made by case officers—can reveal sensitive information about the CIA's tradecraft methods with respect to other spies and similar clandestine operations.

Moreover, because the existence *vel non* of an espionage agreement is itself a classified fact, invocation of a state secrets privilege in every case by the DCI would be an entirely unnecessary exercise. *Reynolds*, 345 U.S. at 11 n.26. And any further judicial inquiry into whether or not the relationship in fact existed could lead to the disclosure of classified information. "Even asserting that there is a secret to protect * * * amounts to letting the cat out of the bag. It is such disclosure of the relationship's very existence that *Totten* sought to avoid." Pet. App. 72a (Kleinfeld, J., dissenting). *Totten* thus avoids the risk that even subtle differences in the manner of invoking the state secrets privilege in different cases will reveal matters of interest to a hostile power. That risk may seem unimportant in an individual case, because a court will not know the context in which it appears. This Court, however, has recognized that "[i]t is conceivable that the mere

explanation of why information must be withheld can convey valuable information to a foreign intelligence agency," which will have "both the capacity to gather and analyze any information that is in the public domain and the substantial expertise in deducing the identities of intelligence sources from seemingly unimportant details." *CIA* v. *Sims*, 471 U.S. at 178-179; see *Gardels* v. *CIA*, 689 F.2d 1100, 1106 (D.C. Cir. 1982); *Halkin* v. *Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978); *United States* v. *Marchetti*, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).

The same is equally true "where there is no espionage relationship to protect," in which case any statement to that effect would "make all non-denials effectively confirmations." Pet. App. 72a (Kleinfeld, J., dissenting). With respect to this case, William H. McNair, the Information Review Officer within the CIA's directorate for foreign intelligence and counterintelligence activities, explained that any official acknowledgment of the truth or falsity of any of respondents' allegations would reveal information that could compromise national security:

> [T]he denial of [an espionage] relationship would itself reveal classified information. If the CIA were to deny a relationship every time one did not exist, then any time the Agency refused to confirm or deny a relationship, it would be tantamount to an admission that such a relationship does in fact exist. Such a procedure would obviously reveal the very information that the CIA seeks to protect (i.e. a current or past covert relationship) and would risk national security.

Id. at 147a n.1.

b. The Ninth Circuit fundamentally disagreed with the CIA's assessment that even responding to respondents' allegations was a national security risk. Thus, the court questioned the CIA's need at the outset to obtain dismissal of suits arising out of an espionage agreement and held that the CIA is compelled in every case to demonstrate harm to national security from official confirmation or denial of whether a plaintiff was a spy for the CIA. The court even held at one point that the district court was permitted to engage in an "evidentiary inquiry * * * to determine whether the alleged relationship with the CIA in fact existed and, if so, whether the resulting relationship gave rise to a legally cognizable property or liberty interest." Pet. App. 37a; accord *id.* at 35a. The court also repeatedly suggested that suits that allege an espionage relationship with the CIA may not jeopardize national security. *Id.* at 35a-36a. The court therefore invited the district court "to second-guess the DCI's determination of what information remains harmful to national security or [is] otherwise embarrassing to the federal government," *id.* at 54a (Tallman, J., dissenting). Judges are ill-suited, however, to make the "complex political, historical, and psychological judgments" that factor into the DCI's assessment of what revelations could damage national security. *CIA* v. *Sims*, 471 U.S. at 176.

For example, the court speculated that the CIA could acknowledge whether respondents were in fact spies without necessarily harming national security because "[i]t is widely known that * * * the CIA recruits foreign spies" and because allegations in the complaint "could be evidence that [respondents'] past relationship with the CIA is not now clandestine." Pet. App. 35a, 36a. But "even if a fact * * * is the subject of

widespread media and public speculation, its official acknowledgment by an authoritative source might well be new information that could cause damage to the national security." *Afshar* v. *Department of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983); *Military Audit Project* v. *Casey*, 656 F.2d 724, 745 (D.C. Cir. 1981); accord *Abbotts* v. *Nuclear Regulatory Comm'n*, 766 F.2d 604, 607-608 (D.C. Cir. 1985).

Another example is the court's mistaken perception that it is relevant that "[a] substantial time has passed since the agreement with [respondents] was formed, and we are no longer 'at war,' 'cold' or otherwise, with [respondents'] country of origin." Pet. App. 36a. The end of the Cold War, and the passage of time generally, do not detract from the CIA's need to protect all aspects of its tradecraft methods in spotting, developing, recruiting, rewarding, and terminating human intelligence sources. For instance, "[t]he *Totten* case was decided over ten years after the end of the Civil War, and whatever military secrets Totten might have uncovered during the war were certainly not current military secrets in 1875." *Guong* v. *United States*, 860 F.2d 1063, 1065 (Fed. Cir. 1988), cert. denied, 490 U.S. 1023 (1989). The relationship is thus a matter "to be *for ever* sealed." *Totten*, 92 U.S. at 106 (emphasis added).

Finally, forcing the CIA to respond to respondents' complaint "through the prism of current state secrets doctrine" (Pet. App. 29a) does not at all address *Totten*'s recognition that judiciary is ill-suited to adjudicate certain core Executive Branch judgments concerning espionage activities. Respondents' suit, at bottom, is a dispute about how much financial assistance or how much internal process the CIA owes to its former spies. The Article III branch has never entangled itself in

such disputes, and the Ninth Circuit's decision would mark a clear break with that historical practice.

F. *Webster* v. *Doe* Does Not Support The Ninth Circuit's Decision

Respondents argue that permitting their constitutional claims to proceed on the merits is supported by the Court's holding in *Webster* v. *Doe*, 486 U.S. 592, 601-605 (1988), which held that Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c) (1988), did not preclude judicial review of a CIA employee's colorable constitutional challenges to his dismissal from the agency. See Br. in Opp. 19-22, 26. The court of appeals similarly reasoned that "*Webster* requires that the constitutional nature of [respondents'] cause of action weigh heavily in applying the *Reynolds* state secrets privilege standard." Pet. App. 35a. That contention is mistaken.

1. *Webster* did not involve an assertion that *Totten* required dismissal of the action, and indeed the majority opinion did not even cite *Totten*, much less suggest that *Totten* has been superseded by *Reynolds*. The circumstances of *Webster* also differ considerably from those of this case. *Webster* involved a suit by an *employee* of the CIA, albeit one who was engaged in clandestine activities, and did not involve an alleged espionage source who had entered into a covert agreement with the agency and its case officers. Although the Ninth Circuit viewed the two circumstances as involving distinctions of mere "nationality and location," Pet. App. 34a, the national security implications and the historical treatment of the two situations are meaningfully different. In the former case, acknowledgment of the mere existence of an employment relationship with the CIA, along with other details of that relationship, generally may be, and has been, revealed in a lawsuit

without compromising national security. Thus, as long as a covert CIA employee's name is not identified, certain aspects of his or her activities (*e.g.*, the case officer's GS pay rank) may not necessarily expose classified information. As the Court in *Webster* noted, the CIA has routinely entertained employment disputes under Title VII concerning the hiring and promotion policies of Agency employees. 486 U.S. at 604.

In the case of a non-employee espionage agent, the CIA has determined that different considerations of national security and foreign relations are implicated if the CIA were to confirm or to deny the existence of a human intelligence source recruited by a CIA case officer to steal the secrets of an enemy. In that class of cases, there is generally no aspect of an espionage relationship that can be revealed, including confirmation or denial of the relationship's existence. That conclusion is consistent with the traditional government practice of refusing to acknowledge an espionage relationship, see pp. 18-19, *supra*, and the conclusion is owed substantial deference because the Executive Branch is uniquely situated and entrusted to determine whether disclosure of intelligence information would compromise national security. See, pp. 21-22, 24-25, *supra*.

Moreover, as *Totten* holds, it is evident on the face of a complaint by an espionage agent seeking additional or different compensation than that awarded by the CIA that the agent's claim cannot proceed without disclosure of classified facts, *i.e.*, the relationship's existence and the details of that relationship. And there is no historical (much less routine) practice of litigation of claims by former spies that the CIA has provided them with insufficient compensation or that the CIA does not have fair procedures for dealing with financial claims by former spies. Indeed, unlike Title VII, which applies to

federal employees and guarantees them specific statutory rights, 42 U.S.C. 2000e-16(a), there has never been any recognized cause of action for former espionage agents who are dissatisfied with the CIA's recruitment, compensation, or termination.

2. Respondents' reliance on their due process allegations fails for more fundamental reasons as well. The Court construed the statute at issue in *Webster* in a way to avoid a "'serious constitutional question'" were Congress to "deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603 (quoting *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). This is not a case in which a congressional statute is being construed, however, but a case in which the complaint asserts a constitutional entitlement to payments and process under a secret espionage agreement. But the fundamental premise of that relationship is that neither side has a legally enforceable claim to hold the other side to the terms of the agreement. There is simply no legally cognizable or constitutionally-protected interest to safeguard.

In addition, even under the Ninth Circuit's ruling, respondents' claim can be defeated by the invocation of the state secrets privilege. As the Ninth Circuit acknowledged (and respondents have not disputed), if the head of the CIA were to assert that the existence *vel non* of an espionage relationship with respondents is a state secret, and the district court were to agree with that determination and further conclude that respondents' suit could not proceed without the disclosure of that secret, respondents' constitutional claims would be dismissed and respondents would be "left without redress even if everything they allege is true." Pet. App. 18a; accord *id.* at 14a-15a n.7.

The Due Process Clause does not entitle an alleged spy to insist on assertion of the state secrets privilege, as opposed to a *Totten* dismissal. To the contrary, under *Totten*, and as confirmed by *Reynolds*, no such formal invocation of the privilege is necessary, let alone constitutionally compelled. Rather, respondents' action should have been dismissed "on the pleadings without ever reaching the question of evidence," because "the very subject matter of the action, a contract to perform espionage, [is] a matter of state secret" and "it [is] so obvious that the action should never prevail over the privilege." *Reynolds*, 345 U.S. at 11 n.26. That result raises no serious constitutional question. Under the state secrets privilege, "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake," *id.* at 11, and an action may be dismissed, even if constitutional claims are involved, when a plaintiff cannot establish his case without the use of such information.[4] Likewise, respondents' due process allegations do not alter the fact that their action, including any due process claim, is premised on a state secret—the existence of an espionage relationship—and *Totten*'s categorical rule accordingly bars judicial resolution of their claims.

* * * * *

The United States has always employed spies to serve its foreign relations and national security interests. Such arrangements are inherently secret and

[4] *E.g.*, *Darby* v. *US Dep't of Def.*, 74 Fed. Appx. 813 (9th Cir. 2003); *Weston* v. *Lockheed Missiles & Space Co.*, 881 F.2d 814 (9th Cir. 1989); *Molerio* v. *FBI*, 749 F.2d 815 (D.C. Cir. 1984); *Halkin* v. *Helms*, 690 F.2d 977 (D.C. Cir. 1982); *Salisbury* v. *United States*, 690 F.2d 966 (D.C. Cir. 1982).

always have been treated as such throughout our history. This suit, which alleges that respondents are former spies who are entitled to an award of compensation from the CIA and a court order mandating the CIA to adopt fair procedures for dealing with them, could not be more inconsistent with the Nation's traditions in treating espionage activities as secret, entrusted to the Executive Branch, and beyond the realm of judicial resolution. The courts below accordingly should have applied *Totten* and dismissed respondents' suit.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded with instructions to dismiss the complaint.

Respectfully submitted.

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No. 03-1395

In the

Supreme Court of the United States

GEORGE J. TENET, individually, PORTER J. GOSS, Director of CENTRAL INTELLIGENCE and DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, and UNITED STATES OF AMERICA,
Petitioners,

v.

JOHN DOE and JANE DOE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether *Totten v. United States*, 92 U.S. (2 Otto) 105 (1875), empowers the Executive in a case presenting colorable constitutional claims to deprive courts of subject matter jurisdiction and to circumvent the requirements of the state secrets privilege and the procedural safeguards of *United States v. Reynolds*, 345 U.S. 1 (1953), based solely on the Executive's unilateral and conclusory assertion that disclosure of state secrets is inevitable.

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I. STATEMENT OF THE CASE

John and Jane Doe, Respondents in this proceeding, are United States citizens residing in the United States. The Does seek in this action to compel the CIA to provide a procedurally fair and lawful *internal* agency hearing to address their claims for assistance and personal security. (App. 9a, 117a-142a; R.App. 3-4)[1] The Does assert constitutional claims involving violations of property and liberty interests under the Fifth Amendment of the Constitution. (App. 6a, 136a-137a)

The Does are proceeding under pseudonyms and without disclosing any classified information. The CIA has pre-approved for filing the complaint and every brief, declaration, and document the Does have filed, including this brief. (App. 22a-23a; J.App. 31)[2]

Rather than asserting the state secrets privilege to address its alleged concerns, the Executive seeks dismissal of this action based on nothing more than its unilateral and conclusory assertion that state secrets inevitably will be revealed if the case goes forward. The Executive thus seeks to exclude the Judiciary from any consideration of whether the Does' constitutional claims can go forward. The district court and Ninth Circuit properly rejected the Executive's contention that the Judiciary is institutionally incapable of dealing with cases touching upon matters of national security. Both the district court and Ninth Circuit were careful to provide the Executive an opportunity to assert the state secrets privilege, noting the significant deference to which assertion of the privilege would be entitled.

A. Background

The Does are former Cold War defectors who were coerced by the CIA into being intelligence sources. John Doe was a high-ranking diplomat for a country considered an

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[1] "App." refers to the separately bound appendix submitted with the Petition for a Writ of Certiorari. "R.App." refers to the separately bound appendix submitted by the Does with the Response to Petition for Writ of Certiorari.

[2] "J.App." refers to the separately bound appendix submitted with the Brief for the Petitioners.

enemy of the United States during the Cold War. For a period during the Cold War, John Doe and his wife were posted on a diplomatic mission in a third country, where John Doe held a senior diplomatic assignment. The Does resided in their country's embassy compound and were subject to constant surveillance by that nation's security service. Well-educated and successful in their own society, the Does were nonetheless disenchanted with Communism. During John Doe's diplomatic posting, the Does approached a person known to them to be attached to the United States embassy and requested assistance in defecting to the United States. The Does had no interest in conducting espionage. (App. 121a-122a; R.App. 1-2, ¶¶ 2-4)

CIA agents intervened, taking the Does to an Agency safe house where they were held for nearly 12 hours, time sufficient to create extreme danger of exposure. The Agency officers employed intimidation and coercion to cause the Does to remain at their diplomatic post and conduct espionage for the United States for a period of time. The Agency officers stated that after this period the Agency would arrange for travel to the United States and ensure financial and personal security for life. The Agency officers professed that such support was "required by law." As with any agent recruitment at this high level, the commitments made were approved at the highest level of authority at the Agency. The Does resisted the requests of the agents, stressing that all they sought was assistance in defecting. The agents persisted, using tactics that induced great fear and uncertainty in the Does. Believing that they had no real choice, the Does reluctantly proceeded to work "in place" for the United States. (App. 122a-123a; R.App. 2-3, ¶¶ 3-4, 66-67)

After doing what was requested of them at great personal risk and for the time period that the agents had said was required to obtain assistance and Agency protection, the Does requested that the Agency arrange for their defection and travel to the United States. Instead of making the arrangements, the Agency pressured the Does into undertaking espionage that would expose the Does to far greater danger and virtually guaranteed that their activities would become known to the first nation, putting them at lifelong risk of retaliation, including assassination. Again, believing they had no choice, the Does complied with the

Agency's demands for progressively more dangerous activities. (App. 123a; R.App. 3, ¶¶ 5-6)

After performing these highly dangerous and valuable assignments, the Does were eventually brought to the United States and provided new identities and false backgrounds by the Agency. The Agency offered to "retire" the Does with financial and health benefits, but the Does desired to work and become integrated into American society. (App. 123a; R.App. 3)

Throughout the resettlement process, as they had done before, Agency officials stated to the Does that the Agency would provide a "safety net" for life of financial assistance, health care, and personal security, stating that this was "required by law" and by the fact that the Does had "PL-110 status."[3] As soon as permitted by law, the Does became United States citizens. (App. 122a-125a; R.App. 2-6)

With his false identity and false background and only with the Agency's assistance, John Doe found employment. (App. 124a; R.App. 4, ¶ 8) After a number of years of successfully supporting himself and Jane Doe, John Doe lost his job due to circumstances unrelated to his job performance. (App. 125a; R.App. 5, ¶ 13) Pursuant to prescribed procedures, the Does contacted the Agency and requested assistance. They received no response for nearly four months. When a response did come, the Agency's letter expressed gratitude and respect for past services to the United States but indicated regret that no funds were available due to "budget constraints." (App. 128a; R.App. 6, ¶¶ 14-15) No other reason was given for not assisting the Does. The Agency's letter, which, again, has been cleared by the Agency for public filing, stated in part:

> 5 June 1997
>
> Dear ***
>
> Thank you for your letter and resume. We are very sorry that it has

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[3] The CIA administers a program referred to as "PL-110" that involves (a) bringing into the United States a very limited number of defectors and certain other "essential aliens" outside normal immigration procedures and (b) the provision of assistance and security to these people. (App. 3a, 87a, 123a; R.App. 24-31) The Does have "PL-110 status." (R.App. 23)

taken this long to respond to your telephone calls and letter, but we have been in a state of transition and have been unable to give your problem our fullest attention until recently. . . . [W]e sympathize with the situation you find yourself in but regret that due to our budget constraints, we are unable to provide you with additional assistance. . . .

We want you to know that this office has great respect for the people we serve and we remain grateful for your past service to this country. We continue to be concerned for your security and welfare and would hope to be flexible should you require assistance in the future. Again, we wish you and your family every success.

Sincerely, /s/ * * *

(R.App. 16-17)

John Doe's efforts to find new employment were restricted by his security arrangements with the Agency to a certain segment of the employment marketplace, and this segment was in general contraction nationwide. The Agency's security arrangements also required John Doe to continue to use the false name and false background created by the Agency, and the Agency refused to assist, as it had in the past, to facilitate employment opportunities, for example, by talking with senior management of potential employers, and to mitigate the problems presented by John Doe's situation, including his false credentials. John Doe's efforts to find new employment also were limited by his age and his poor health. (App. 125a; R.App. 5-7)

In an effort to reduce their cost of living to a minimum, when John Doe's unemployment benefits ran out, the Does temporarily left the United States to live with an aging relative in a former Eastern Bloc country in near subsistence-level conditions. This act of desperation greatly increased the risk to the Does' personal security, given the sanctions imposed by the former country of death or life imprisonment

as a result of having conducted espionage activities for the United States. (R.App. 7-8; App. 123a, 126a) During this time, John Doe came into direct contact with a person known to be, at least in the past, an officer of the state security service for the Does' former country. The combination of a grave concern for their personal security and the need for competent medical treatment for health issues prompted the Does to return to the United States. The Does subsisted on their modest retirement savings and temporary work they obtained. (App. 127a; R.App 8-9) Despite the considerable obstacles he faced, John Doe continued to seek employment. (App. 129a; R.App. 7, ¶ 20)

B. Internal Agency Proceedings

When further attempts at obtaining Agency assistance failed, the Does sought and obtained pro bono legal representation. The Agency subsequently granted the Does' counsel security clearances to represent the Does. (App. 129a; R.App. 6, ¶ 16, 18, ¶ 2)[4] The Does' counsel were provided with the Agency's unclassified Security Guidance for Representatives in connection with their security clearances. (J.App. 27-32)

In 1997, in conjunction with the granting of security clearance to the Does' counsel, an attorney from the CIA's Office of General Counsel explained to the Does' counsel that the Agency's refusal to provide further benefits was based on its unilateral, after-the-fact, subjective evaluation of the services performed by the Does and that the Agency had determined that the benefits previously provided were "adequate" for the "services rendered" and that the Does would receive nothing further. (App. 129a; R.App. 18-19) There was no mention of the previously cited "budget constraints."

The lawyer from the CIA General Counsel's office advised that the Does could "appeal" the decision to the Director of Central Intelligence ("DCI"), but was unable to respond to counsel's questions, including questions about procedures involved in an appeal to the DCI, because she

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[4] Security clearances were granted to Steven W. Hale and Elizabeth A. Alaniz. As this case grew in complexity, additional persons worked on the Does' case but were not privy to classified information.

said she was "just a messenger." The Does' counsel requested an opportunity to meet with a more senior Agency lawyer and with an Agency person who was substantively knowledgeable. These requests were denied or ignored. (App. 129a-130a; R.App. 18-20)

Pursuant to the Agency's cursory instructions, the Does prepared a detailed "appeal" based on the "value of the services performed" and delivered it to an Agency courier as the Agency instructed. In connection with this effort, the Does' counsel repeatedly requested from the Agency copies of regulations governing the appeal process, the PL-110 rules and regulations, and access to records potentially relevant to this matter that were classified within the level of security clearances granted the Does' counsel. These requests were ignored or denied. (App. 130a-131a; R.App. 18-20)

At the same time the Does filed their appeal to the DCI, the Does requested an independent review by the Agency's Inspector General ("IG"). This request for IG review and the follow-up request to which no response was received have not, to the Does' knowledge, ever resulted in any review by the IG. Certainly, the Does have never been advised of such a review by the IG or the outcome. (App. 130a-131a; R.App. 20)

Subsequently, Agency counsel orally advised the Does' counsel that the Deputy Director of Operations (not the DCI) had denied their appeal. (App. 131a; R.App. 20) Agency counsel advised that a further appeal was possible to the Helms Panel, a panel of former Agency officials. Confused about the appeal process, given the inconsistent and contradictory oral information provided by the Agency, the Does again requested copies of the regulations or rules governing appeals and written confirmation of the Agency's appeal determination. Both requests were ignored. (App. 131a; R.App. 20)

Despite the severe limitations imposed by the Agency's conduct, the Does nonetheless pursued an appeal to the Helms Panel with a written appeal statement. The Does again requested access to documents and persons and copies of pertinent regulations. All requests were denied or ignored. The Does' counsel additionally repeatedly requested an opportunity for the Does, or at a minimum, their cleared counsel, to appear before the Helms Panel and present their

case. The Does' counsel also requested the opportunity to confront witnesses, whose identities could, if needed, be concealed. These requests were directed both to the Agency and the Helms Panel. All such requests were either denied or ignored. (App. 131a-132a; R.App. 21) The Helms Panel review thus proceeded without participation by the Does, other than the previously prepared appeal statement, which the Does later learned was directed to the wrong issues because of misinformation provided by the CIA. (App. 87a-88a, 131a-133a; R.App. 21, 41-51)

Agency counsel subsequently told the Does' counsel orally that the DCI had determined, based on the Helms Panel recommendation, that the Agency should provide certain benefits to the Does for no more than one year, and nothing thereafter. (App. 132a; R.App. 21) Agency counsel also subsequently advised that in order to accept the benefits of the DCI's decision, the Does would have to execute complete releases. The Does' counsel requested clarification of whether the appeal process, including the DCI's decision, was an adjudication of the Does' rights, and if so, how it could be predicated on a demand for a release. The Agency did not respond. (App. 132a; R.App. 22) The additional benefits were not provided.

Although the Agency refused to provide a copy of the DCI's decision, one of the Does' cleared counsel was permitted to read the written decision at a secure location. The document bore no classification. The DCI's written decision did not state the reasons for rejecting the legal arguments and factual assertions advanced by the Does in their appeal or the evidence relied upon. In addition, the Does' counsel were also permitted to read a document that purported to be the minutes of the Helms Panel proceeding, which was short and lacking in detail. The brief summary of the statements of three persons who appeared before the Helms Panel contained information that was incomplete and misleading, except that one person testified that she had explained to the Does that PL-110 status is a lifelong commitment for security. (R.App. 21-22)

The Does' counsel's further attempts to discuss the merits of the dispute with the Agency were ignored or denied by the Agency. Finally, when the Does' counsel stated to an Agency lawyer that the Agency's failure to provide a fair process and apply accepted legal principles left the Does with no option

but to go to court, the Agency lawyer's response was a confident "how are you going to get around *Totten*?" (R.App. 22) with the clear implication that the Agency considered itself immune from judicial scrutiny.

C. Proceedings in the District Court

By then in dire circumstances, and having exhausted the only administrative process they were given, the Does filed suit alleging violations of their substantive and procedural due process rights, based both on property and liberty interests, and seeking a constitutionally adequate internal CIA process, including a declaration that the CIA is required to follow substantive law. (App. 117a-142a)

The Executive moved to dismiss under Fed. R. Civ. P. 12(b)(1) and (6), emphatically denying the existence of any legal source of entitlement to assistance for persons in the Does' position, and asserting that national security and *Totten* precluded the court from considering the Does' case. The Executive did not assert the state secrets privilege.

The district court denied the Executive's motion, finding that "litigation of plaintiffs' claims will not require public revelation of the defendants' intelligence gathering methods," noting the Court's recognition in *Webster v. Doe*, 486 U.S. 592, 604 (1988), that "the District Court has the latitude to control any discovery process which may be instituted so as to balance [plaintiffs'] need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." (App. 106a-107a) The district court further observed that the Executive had reviewed and pre-approved for public filing all papers and that it "could request leave to submit materials in this matter under seal or *in camera*, or may assert the state secrets privilege recognized in *United States v. Reynolds*, 345 U.S. 1, 7-8 . . . (1953)." (App. 107a) The district court also found that "the public interest will not be harmed" because the court "understands the need for confidentiality and has the power to allow motions to be filed under seal and heard in closed hearings." (App. 93a)

The Executive then filed a "Motion for Summary Judgment or in the Alternative, Renewed Motion to Dismiss." The Executive still did not assert the state secrets

privilege. Having feigned ignorance about a "PL-110 program" in its first motion, remarkably in its second motion the Executive admitted the existence of a program for resettlees[5] under the statute "commonly known" as "PL-110" and the existence of regulations governing it. (App. 87a-88a, 144a) The Executive's motion relied on a declaration by a mid-level Agency official (William McNair, an "Information Review Officer") who offered his legal conclusion that applicable regulations—which had not been provided to the Does or to the court—provided the Does no rights. (App. 145a)

The Executive's filing of a declaration containing various factual assertions effectively negated the parties' agreement to proceed without discovery until the jurisdictional issue was resolved. Accordingly, the Does sought production under Fed. R. Civ. P. 34 of the regulations referenced in the McNair Declaration and noted his deposition. Without moving for a protective order, the Agency produced a redacted version of selected portions of the PL-110 regulations and made Mr. McNair available for deposition. (R.App. 41-50)

This limited discovery, all accomplished without the Executive asserting the state secrets privilege, established that PL-110 regulations provide that the "*safety and security*" of resettlees are the "*continuing responsibility of CIA*" (R.App. 49-50) (emphasis added) and provide for continued financial assistance after resettlees obtain U.S. citizenship, and for life, if appropriate, due to *age, health or financial need* (R.App. 41-50); that the standard for obtaining benefits under the PL-110 program is *not* the "value of services" standard the CIA had advised the Does applied to their administrative appeal (R.App. 19); and that regulations exist but were not produced relating to the determination of benefits to resettlees and resolution of grievances. (R.App. 97-99)

Mr. McNair also testified that he was involved on behalf of the CIA in judicial proceedings involving classified information on a regular basis. (R.App. 68-71) Mr. McNair further admitted that his declaration was drafted by Agency lawyers and he was unable to identify what portion was in

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[5] Resettlees is the word used by the CIA for defectors. (R.App. 61-64)

fact his testimony and what was the lawyers' testimony. (R.App. 90-91) Although Mr. McNair admitted the existence of additional regulations, the Executive refused to produce any such documents in response to the Does' requests, even in redacted form, and even declined to permit the Does' cleared counsel to review any of the regulations in a secure location. (J.App. 41-46) The Executive initially justified its refusal to allow the Does' counsel to review the unredacted version of the produced PL-110 regulations and the non-produced PL-110 regulations on the ground that the Does' counsel's security clearances were issued only for the Agency administrative process and had expired. (J.App. 43)

The Executive later retracted this assertion, confirmed that the clearances were still in effect, but claimed the information was being withheld because the Agency had made a unilateral determination that the Does' counsel "did not have a need to know." (J.App. 33-34) The Agency even refused to allow the Does' cleared counsel to review documents previously shown to them and refused to allow the Does' counsel access to their own notes, which had been retained by the CIA, contrary to the express terms of the Security Guidance for Representatives provided to the Does' cleared counsel. (J.App. 27-34, 41-46)

Despite the Executive's refusal to produce the requested PL-110 regulations or make them available for review at a secure location, several days later the Executive filed a reply brief in support of its motion for summary judgment, attaching yet another previously undisclosed regulation.

The district court denied defendants' second motion, noting that:

> [i]n their first motion to dismiss, defendants claimed not to know what PL-110 was. Now, they acknowledge not only the existence of PL-110, but also the existence of CIA internal regulations concerning the PL-110 program and the financial benefits accorded to defectors. . . . Defendants' initial denial of knowledge of PL-110, followed by their subsequent acknowledgment of PL-110 and related regulations, **weaken their credibility**.

(App. 87a-88a (footnote omitted) (emphasis added))

After the second denial of the motion to dismiss, the Executive moved for leave to file an interlocutory appeal. The district court granted the motion and stayed proceedings in the district court. (App. 79a)

D. Proceedings in the Ninth Circuit

The Ninth Circuit affirmed in a 2-1 decision (App. 1a-64a), rejecting the Executive's argument that *Totten* requires dismissal of this case on jurisdictional grounds and holding that this case is governed by the state secrets privilege. (App. 18a) The Ninth Circuit acknowledged that "it could very well turn out, after further district court proceedings, that the Does will still be left without redress even if everything they allege is true." (*Id.*) The court observed that because the "net result of refusing to adjudicate the Does' claims is to sacrifice their asserted constitutional interests to the security of the nation as a whole, both the Executive and the courts need to consider discretely, rather than by formula, whether this is a case in which there is simply no acceptable alternative to that sacrifice." (App. 19a) The opinion noted that "[s]tate secrets privilege law prescribes that courts must be sure that claims of paramount national security interest are presented in the manner that has been devised best to assure their validity and must consider whether there are alternatives to outright dismissal that could provide whatever assurances of secrecy are necessary." (*Id.*) The Ninth Circuit also concluded that this "counterweight role has been reserved for the judiciary [and the judiciary] must fulfill it with precision and care, lest we encourage both executive overreaching and a corrosive appearance of inequitable treatment of those who have undertaken great risks to help our nation, an appearance that could itself have long-run national security implications." (*Id.*)

The Ninth Circuit denied the Executive's motion for rehearing or alternatively for rehearing *en banc*. Writing in dissent, Judge Kleinfeld observed, "I hope that the Does' account is fictional (though I do not intimate that it is, having no knowledge). Little could be worse for our ability to engage spies than insecurity about whether they will get what

was promised to them. If what the Does allege is true, a serious injustice has been done to them, and the injustice to them is seriously harmful to the long-term security interests of the United States."[6] (App. 75a)

II. SUMMARY OF THE ARGUMENT

The Does seek to compel the CIA to provide a procedurally fair internal agency hearing for their claims for assistance and personal security, and a declaration that the Agency is required to comply with substantive law in addressing these claims. (App. 117a-142a) The Does have taken every precaution to avoid disclosure of state secrets. It is difficult to conceive of a case in which greater respect for state secrets could be shown. Apart from the limited nature of the relief they seek—a fair and lawful hearing within the CIA—it is uncontested that their complaint and other public filings allege no classified facts. Indeed, the Agency has pre-approved all filings. This approach protects against disclosure of any classified information.

The Executive insists that this case necessarily will reveal state secrets if it goes forward yet it has chosen not to assert the state secrets privilege, preferring instead to advocate a different and previously unrecognized rule that would deprive the courts of subject matter jurisdiction over this case based solely on the Executive's unilateral and conclusory assertion that disclosure of state secrets is inevitable.

The district court correctly found that it was *not* inevitable that state secrets would be revealed if the case went forward, and the Ninth Circuit agreed. (App. 35a-38a,

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[6] The serious injustice to the Does that Judge Kleinfeld noted has been aggravated by the over seven-year delay since the Does first sought assistance from the Agency in 1997, with no opportunity for the Does to address the merits of their case, notwithstanding the showing of extreme hardship (R.App. 1-10) evidenced by the Ninth Circuit's order expediting the appeal. (R.App. 39) Adding to this injustice is the fact that if the Does had not located counsel to handle their case pro bono (at a cost so far of over $1.9 million), they would have had no way to pursue this case given the Executive's steadfast resistance to providing them even a remotely fair hearing. Access to justice should not be so delayed or so costly, particularly where constitutional liberty and property interests are involved.

106a-107a) The Court of Appeals was careful to provide the Executive an opportunity to assert the privilege (App. 39a) (directing the district court on remand to allow the CIA the opportunity to assert the state secrets privilege). In so doing, it made clear the substantial deference to which a claim of privilege would be entitled, and that the Does' interests ultimately might have to yield to the "larger public good." (App. 18a) The opinion shows appropriate deference to the Executive while maintaining the constitutional role of the Judiciary, including the protection of individual constitutional rights.

The Does do not dispute the right of the Executive to assert the state secrets privilege or the significant deference to which such an assertion would be entitled. The Does do dispute the existence of a wholly different rule that defines another land of governmental "say-so," *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2637 (2004) (citing district court), where absolute authority is demanded by the Executive based on nothing more than its assertion that a blanket rule of dismissal is necessary.

The Executive's position is that dismissal is required simply because a case touches on a covert relationship. It relies for its position on *Totten v. United States*, 92 U.S. (2 Otto) 105 (1875), which it contends deprives courts of subject matter jurisdiction whenever a case touches on a covert relationship related to espionage. The Ninth Circuit correctly rejected the Executive's proposed reading of *Totten*, and held that this case is governed by the state secrets privilege as set forth in *United States v. Reynolds*, 345 U.S. 1 (1953). Despite the Executive's protests that the state secrets privilege is inadequate to protect national security and that compliance with the privilege would improperly interfere with the DCI's other duties, there is not a shred of support in the record for these propositions.

Reynolds, the landmark state secrets case, decided at the height of the Cold War at a time of grave national peril, established a framework designed to protect state secrets while at the same time ensuring that claims of privilege are not invoked lightly or for illegitimate reasons. The state secrets privilege and the framework of *Reynolds* have for over half a century protected the Nation's secrets while preserving the constitutional role of the courts, and the

Executive does not contend otherwise. Nor does it contend that a covert relationship is not a type of state secret.

Reynolds recognizes that there may be instances where it is so obvious to the court that a case cannot proceed without disclosing state secrets that the privilege may be upheld on the pleadings. 345 U.S. at 11 n.26. Nowhere, however, does *Reynolds*, or any decision of this Court, including *Totten*, authorize the Executive to force dismissal of a case based on nothing more than its conclusory assertion that dismissal is necessary. Regardless of where a case falls on the continuum, *Reynolds* makes clear that it is a *judicial* function to determine whether a given case may proceed without public revelation of state secrets. The Judiciary must give appropriate deference to the Executive in making this determination, but it cannot abdicate this responsibility to the Executive. Here, both the Ninth Circuit and the district court concluded that disclosure of state secrets was *not* inevitable.

The Executive goes to great lengths to demonstrate the importance of human intelligence and the confidentiality these activities must be accorded. These propositions are not in dispute. The Does readily admit the importance of these activities, whether they are called spying, covert intelligence activities or human intelligence, and the need for secrecy. What the Executive fails to do is to demonstrate that these intelligence activities are any more secret or sensitive or are any more deserving of a special jurisdictional rule than any other types of espionage or state secrets, or that the state secrets privilege is insufficient to protect national security in this case.

The Executive's position in this case is particularly untenable because the Does assert constitutional claims. The Court has noted the "'serious constitutional question'" that would arise from the denial of "any judicial forum for a colorable constitutional claim" in *Webster v. Doe*, 486 U.S. 592, 603 (1988). The Executive offers no viable basis to distinguish *Webster*.

The Executive contends that dismissal of the Does' claims would present no constitutional difficulty because the case would have to be dismissed in any event if the Executive asserted the state secrets privilege and the court sustained it.

(Pet. Br. at 41)[7] This argument unjustifiably assumes the conclusion and is disrespectful of the courts' role in such matters. There is a world of difference between dismissal of a cause of action based on a careful evaluation by a neutral and independent Judiciary that has considered whether less draconian measures are available and a blanket rule that divests citizens of constitutional rights by Executive fiat.

The Executive's position is also unnecessarily broad. The Executive itself admits that not all cases against the Agency require the revelation of state secrets. The Executive has conceded that when plaintiffs proceed as "Does," certain aspects of their activities can be discussed without necessarily compromising national security (Pet. for Writ at 14 n.4)[8] Moreover, the Agency's own witness testified that proceedings involving the Agency and classified information occur routinely in courts. (R.App. 68-71)

The Executive attempts in this case to eliminate the Judiciary's vital constitutional role. The Executive's view that it can dictate whether a case may or may not go forward is an extreme position and a departure from long-accepted principles of separation of powers. History has demonstrated that courts are not institutionally incapable of dealing with cases touching upon national security. Acceptance of the Executive's position would set a course toward the complete erosion of *Reynolds* and a perilous concentration of power in the Executive. Such a departure from established law is not justified by this case.

III. ARGUMENT

A. The Executive Mischaracterizes This Case

The Executive attempts to force this case within its conception of *Totten* by repeatedly suggesting that the Does seek "to enforce the terms of an alleged agreement to perform espionage services" (Pet. Br. at 4), and that this case seeks "redress for the CIA's alleged wrongful refusal to compensate a spy." (Pet. Br. at 17) This is incorrect, as the district court and Ninth Circuit noted. (App. 11a-17a, 105a)

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[7] "Pet. Br." refers to the Brief for the Petitioners.

[8] Pet. for Writ" refers to the Petition for a Writ of Certiorari.

The Does do not seek to enforce a contract, but rather to compel the CIA to provide a procedurally fair internal agency hearing for their claims for assistance and personal security, and a declaration that the CIA is required to comply with substantive law in dealing with their claims. (App. 117a-142a) The Does' claims are based on constitutional rights, not on contract. Their request does include financial assistance to cover basic human necessities including minimal shelter and sustenance, but it is also about health care, personal security and assistance in finding a job. The Executive's characterization of the Does' claims as seeking financial "compensation" for their espionage activities on behalf of the United States (Pet. Br. at 17) is not remotely fair or accurate. A reading of the complaint and a review of the CIA regulations governing the PL-110 program make plain that the Executive's characterization of this case is disingenuous.

The Executive incorrectly maintains that judicial consideration of the Does' claims would interfere with the Executive's conduct of international affairs. The Executive further mischaracterizes this case as threatening to interfere with the recruitment, compensation or termination of spies. (Pet. Br. at 22) This case does not concern the Executive's formulation or execution of foreign policy, nor does it involve the details of espionage. This case concerns whether a United States agency is required to comply with United States law in addressing the claims of United States citizens, and whether the Executive has authority to preclude the Judiciary from even deferential consideration of whether the Does' claims may proceed without disclosure of state secrets.

Nor does this case present a nonjusticiable "political question," as the Executive obliquely contends. Without engaging in the requisite analysis of the political question doctrine, the Executive cites *Baker v. Carr*, 369 U.S. 186, 211-17 (1962) (Pet. Br. at 21), apparently for the general proposition that principles of separation of powers preclude judicial review of matters that purport to touch upon national security or foreign affairs. This case does not present questions committed by the text of the Constitution exclusively to the Executive. The Executive cannot establish that it meets any other element of the requisite analysis. "[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."

Baker, 369 U.S. at 211; *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

B. This Case Can Be Resolved Without Disclosure of State Secrets

The question whether this case can be resolved without disclosure of state secrets should, in the first instance, be directed to the district court. The district court in turn should be guided by the principles and adhere to the procedures of the state secrets privilege and its constitutional responsibility to explore whether there is a way for the Does' case to be resolved without disclosure of classified information. If the Executive ultimately asserts the state secrets privilege, the district court will treat the assertion with appropriate deference. (App. 39a) In addition, the district court can consider the record in this case in determining what nonsensitive information can be disentangled from sensitive information. The deposition transcript of CIA officer William McNair and the redacted PL-110 regulations voluntarily produced by the CIA (R.App. 41-50, 51-131) provide examples of nonsensitive disclosures that are possible.

The district court can also consider the Executive's admission that when a plaintiff proceeds using a pseudonym, disclosure of state secrets relating to a relationship with the CIA is not inevitable. (Pet. for Writ at 14 n.4) Further, the details of what process the Does were given and not given can hardly be claimed to be a state secret.[9] Moreover, the PL-110 materials belatedly disclosed by the Agency indicate that age, health and financial condition are relevant factors for the Agency to consider under the PL-110 program. (R.App. 44) The Does' age, health and financial condition are obviously not classified. Finally, the district court can consider whether it is appropriate to conduct *in camera* or closed hearings or to employ other procedures available to it, if appropriate. (App. 23a-25a, 31a-33a, 93a)

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[9] The district court noted that under the facts as alleged, the Does were afforded "very little process." (App. 109a)

C. The Executive's Proposed Reading of *Totten* Violates the Constitution and Principles of Separation of Powers

Much of the Executive's argument concerns the need for secrecy in foreign intelligence operations. With that part of the argument the Does do not take exception. The Does do take exception to the conclusion that protecting state secrets requires compromising the Judiciary's constitutional role.

The Executive argues that separation of powers principles bar judicial review of "certain matters," including this matter, that purport to touch upon "foreign affairs and national security" (Pet. Br. at 21), and that the Judiciary lacks the institutional competence to conduct such review without improperly intruding on judgments wholly entrusted to the Executive. (Pet. Br. at 23)

In advancing this position, the Executive seeks an unwarranted expansion and concentration of Executive power in a manner that severely compromises the Judiciary's own constitutional obligations. The Executive seeks to circumvent the obligations of the state secrets privilege, a privilege based on critical separation of powers principles and the history of which amply demonstrates the courts' extensive experience and high degree of competence in fulfilling their requisite function in a manner that does not harm the Nation's security.

The role of a co-equal, independent and impartial Judiciary in safeguarding the rule of law in our democracy is axiomatic. The Executive's contention that the courthouse door must remain forever closed even to the most deferential judicial review runs afoul of the fundamental precept of the availability of the courts to enforce the rule of law and ensure procedural fairness when official conduct deprives citizens of liberty or property.

The need to protect secrets on matters pertaining to national security is beyond dispute, but so is the importance of checks and balances in our system of democracy. *See United States v. Nixon*, 418 U.S. 683, 704-05 (1974) (rejecting claim that separation of powers doctrine precludes judicial review of the Executive's claim of privilege, and reaffirming that "it is the province and duty of this Court 'to say what the law is'") (citing U.S. CONST. art III, § 1; *The*

Federalist No. 47, at 313 (James Madison); and quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

While the Executive articulates important interests, those interests do not justify compromising Judicial responsibility based on nothing more than the Executive's unilateral, untested assertion that it is inevitable that state secrets will be revealed. Here, competing interests include the determination of the appropriate process that is due where the constitutional rights of individuals are at issue, and what procedures are necessary to ensure that a citizen is not deprived of life, liberty or property without due process of law in accordance with the Fifth Amendment of the United States Constitution. *See Hamdi*, 124 S. Ct. at 2646. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury*, 5 U.S. at 163.

This Court has recognized, in evaluating the actions of Congress pursuant to that branch's own constitutional authority:

> It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process. The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action. "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan*, (US) 4 Wall, 2, 120-121, 18 L. Ed. 281.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164-65 (1963) (footnote omitted); *see also United States v. Robel*, 389 U.S. 258, 263 (1967) ("[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit.").

The same analysis applies to the Executive's constitutional powers and was recently reaffirmed by the Court in the context of Executive action in *Hamdi*:

> [W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forego any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). . . .

124 S. Ct. at 2650.

While highly sensitive to the obligations of the Executive, the Court nonetheless rejected the view that such obligations deprive the Judiciary of its constitutional responsibilities, stating:

> Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. *Mistretta v. United States*, 488 U.S. 361, 380 . . . (1989) (it was "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty"); *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 . . . (1934) (The war power "is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties"). . . . Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge.

Id.

The Executive also objects to complying with the state secrets privilege because absolute authority is more convenient and would better "preserve[] the CIA's resources." (Pet. Br. at 33) This argument is insufficient to justify abdication of the Judiciary's role, including its responsibility to protect individual constitutional rights. Inconvenience is not a valid basis for deprivation of due process.

Our democracy is not the most efficient form of government, and for good reason. As this Court has noted, "[T]he doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United*

States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). Indeed, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist No. 47* (James Madison).[10]

In articulating the importance of compliance with the state secrets privilege in this case, the Ninth Circuit noted:

> We acknowledge at the outset that it could very well turn out, after [invocation of the state secrets privilege and] further district court proceedings, that the Does will still be left without redress even if everything they allege is true. When the government asserts that the interests of individuals otherwise subject to legal redress must give way to national security interests for the larger public good, the result can end in a balance tipped toward the greater good, with resulting unfairness to the individual litigants as the acknowledged corollary.
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> But precisely because the net result of refusing to adjudicate the Does' claims is to sacrifice their asserted

[10] *Cheney v. United States Dist. Court for Dist. of Columbia*, 124 S. Ct. 2576 (2004), cited by the Executive (Pet. Br. at 34), does not support its separation of powers argument. While reiterating that the President is not above the law, *Cheney* held that separation of powers principles could be considered by the court on remand in evaluating a mandamus petition seeking to modify or dissolve orders directed to the President or Vice President, recognizing the unique position of the Office of the President. Cognizant of the very broad discovery sought by plaintiffs, the Court found that on the facts of the case presented, "the only consequence from respondents' inability to obtain the discovery they seek is that it would be more difficult for private complainants to vindicate Congress' policy objectives under FACA [the Federal Advisory Committee Act]." *Id.* at 2589. In sharp contrast, accepting the Executive's separation of powers arguments here would impair the ability of the courts to perform their Article III function.

> constitutional interests to the security of the nation as a whole, both the government and the courts need to consider discretely, rather than by formula, whether this is a case in which there is simply no acceptable alternative to that sacrifice. The law regarding protection of national security interests in judicial proceedings provides guidance toward that end. States secrets privilege law prescribes that courts must be sure that claims of paramount national security interest are presented in the manner [to] best . . . assure their validity and must consider whether there are alternatives to outright dismissal that could provide whatever assurances of secrecy are necessary. That counterweight role has been reserved for the judiciary. We must fulfill it with precision and care, lest we encourage both executive overreaching and a corrosive appearance of inequitable treatment of those who have undertaken great risks to help our nation, an appearance that could itself have long-run national security implications.
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> * * * *
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> . . . Determining when we must ask individuals to bear the brunt of our national interest is a matter of profound moral importance. We therefore require that the government address the question in a manner commensurate with it its gravity.

(App. 18a-19a, 30a (citations omitted))

While substantial deference is due the Executive in national security matters, such deference is not unlimited and cannot run roughshod over the Executive's obligation to comply with the law of the land and respect this Court's own

constitutional obligations. *See* U.S. CONST., art. II, § 3 (charging the President to "take Care that the Laws be faithfully executed"); U.S. CONST. art. II, § 1, cl. 8 (constitutionally prescribed oath of office requires that President undertake to "preserve, protect and defend the Constitution of the United States").[11] Even in the conduct of sensitive and important matters, the scope of the Executive's power is not unlimited.

D. Dismissal of This Case on Jurisdictional Grounds Is Incompatible With the Principles Embodied in the State Secrets Privilege

The Executive seeks to avoid the requirements of the state secrets privilege by characterizing *Totten* as a jurisdictional or "categorical" bar. The Executive's basic premise is that courts cannot be trusted and are incompetent to deal with issues that touch upon national security and that the CIA should not be "inconvenienced" by the requirements of the state secrets privilege. (Pet. Br. at 23, 33)

The Ninth Circuit correctly rejected the Executive's position. The state secrets privilege and the framework set forth in *Reynolds* have for over half a century protected the Nation's secrets while preserving the constitutional role of the Judiciary. The Executive offers no evidence to the contrary, only conjecture.

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[11] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), does not support the Executive's arguments to the contrary. *Curtiss-Wright* affirmed the fundamental principle that "every . . . governmental power . . . must be exercised in subordination to the applicable provisions of the Constitution." *Id.* at 320; *see also Home Bldg & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) ("[E]ven the war power does not remove constitutional limitations safeguarding essential liberties."); *United States v. Robel*, 389 U.S. 258, 264 (1967) ("Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart."). Unlike *Curtiss-Wright*, this case is not about the conduct of international relations with foreign nations, but rather the constitutional claims of United States citizens. *See also Myers*, 272 U.S. at 292 (Brandeis, J., dissenting) ("Checks and balances were established in order that this should be 'a government of laws and not of men.'").

Reynolds was decided at the height of the Cold War, and its framework is designed to accommodate the exigencies of national security even under conditions of war or grave concern about national security. *See* 345 U.S. at 10.[12] *Reynolds* balances two competing concerns: the protection of state secrets and the Judiciary's responsibility to protect the rights of individual litigants and to prevent Executive abuse. *Id.* at 8.

Reynolds accommodates these concerns by establishing a procedure to ensure that the privilege is not invoked lightly or for improper reasons. *Id.* at 7-8. Specifically, it requires the head of the department with control over the matter to formally assert the privilege after personal consideration. *Id.* at 8. At the same time, the opinion makes clear that in asserting the privilege, the Executive need not detail the secret information it seeks to protect; the Executive need go no further than to provide an explanation sufficient to persuade the court that state secrets are legitimately at risk. *Id.* at 8, 10. The *Reynolds* Court noted, citing *Totten*, that there may be instances where it is so obvious to the court that a case cannot proceed without disclosing state secrets that the privilege may be upheld on the pleadings—but only where the *court* itself is satisfied that state secrets will be revealed if the case goes forward. *Id.* at 11 n.26.

The Executive turns this discussion on its head by treating it as license for the Executive to force dismissal of a case even where, as here, the trial court is *not* persuaded that state secrets will be revealed. This reading is fundamentally incompatible with *Reynolds'* repeated admonition that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id.* at 9-10. *See also id.* at 8 ("The court itself must determine whether

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[12] Between 1950 and 1953, the Soviet Union had shot down no less than five United States military reconnaissance aircraft, and Strategic Air Command aircraft were conducting reconnaissance missions against the Soviet Union while the nation rushed to expand and deploy its nuclear-capable forces. *See generally* Symposium at Strategic Air Command Museum, *Cold War in Flames: The Untold Story of Airborne Reconnaissance* (Sept. 12, 1998); presentation by Greg Skavinski, *Secrets of the Cold War*, U.S. News & World Rep. (Mar. 15, 1993); Kohn & Harafan, *Strategic Air Warfare* (Office of Air Force History) United States Air Force (1988), pp. 90-119.

the circumstances are appropriate for the claim of privilege . . . ."); *id.* at 8 n.21 ("'It is the judge who is in control of the trial, not the executive.'") (citation omitted). Consistent with these principles, the Ninth Circuit concluded that the deference due to an Executive claim of privilege, given the facts of this case, "does not entirely obviate the CIA's need to make a minimally coherent explanation to the court concerning why simply admitting to a relationship with the Does could conceivably jeopardize national security." (App. 36a-37a)

Because assertion of the privilege is accorded substantial deference and because the privilege can operate to deny even valid claims a forum, insistence on the limited requirements of the state secrets privilege is important, particularly where the Does assert colorable constitutional claims. It is also critical that the court have an opportunity to examine alternative procedures, such as *in camera* submittals, should they become relevant to evaluating whether the case can proceed without disclosure of state secrets.

As the Ninth Circuit observed, the procedure may be considered a formality, but "formalities often matter a great deal, and they certainly matter here." (App. 29a) The burden imposed on the Executive is, moreover, modest, particularly when compared to the burden imposed on a litigant, who may be left without a remedy for a valid claim if the privilege is upheld, as the Ninth Circuit recognized. (App. 18a-19a)

E. This Court and Circuit Courts Have Not Treated *Totten* as a Jurisdictional Bar

The Ninth Circuit correctly concluded that *Totten* is an early expression of the evidentiary state secrets privilege, not a jurisdictional bar to the Does' claims. (App. 25a) More than a century of legal development indicates that the policies discussed in *Totten* have been incorporated into the privilege and are subject to the procedures under which the privilege is now governed.

Reynolds treats *Totten* as a privilege rather than a jurisdictional bar. Explaining the history of the state secrets privilege, the Court noted that the "privilege against revealing military secrets . . . is well established in the law of evidence," citing a line of cases, first among which is *Totten*. 345 U.S. at 6-7. *See also id.* at 11 n.26 (citing *Totten* for the

proposition that "the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of *privilege* if the court is ultimately satisfied that military secrets are at stake") (emphasis added); *Rubin v. United States ex rel. Indep. Counsel*, 119 S. Ct. 461, 462 (1998) (dissent from denial of certiorari, discussing ability of courts to recognize "new privileges," citing *Totten* as example for "state secrets privilege" (Breyer, J., dissenting)).

The Executive itself characterized *Totten* in its *Webster* briefing to this Court as an early state secrets privilege case, not a jurisdictional bar as it does here.[13]

A number of circuit courts likewise have treated *Totten* as a state secrets privilege case. *Zweibon v. Mitchell*, 516 F.2d 594, 625 & n.80 (D.C. Cir. 1975) (*en banc*) (describing *Totten* as "foreshadow[ing]" the "*evidentiary* privilege of the Executive Branch with respect to production of documents whose publication could endanger military or diplomatic secrets"); *In re Sealed Case*, 121 F.3d 729, 736 (D.C. Cir. 1997) (*en banc*) (discussing history of Executive privilege, citing *Totten* as "early" ruling that Executive may withhold state secrets); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 548 (2d Cir. 1991) (citing *Totten* in the context of the state secrets privilege).

The Executive fails to cite one case holding that the Executive has exclusive and absolute authority to cause the dismissal of a case by declaring unilaterally that it is "inevitable" that state secrets will be disclosed if a case goes forward. *Guong v. United States*, 860 F.2d 1063 (Fed. Cir. 1988), on which the Executive relies, does not stand for this

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[13] In briefing submitted to the Court in *Webster v. Doe*, 486 U.S. 592 (1988), the Executive explained that:

> [t]he military and state secrets privilege was generally established before Congress adopted the National Security Act of 1947 and the CIA Act of 1949. *Totten*; see *Reynolds*, 345 U.S. at 6-8 (discussing the origins of the **privilege**). **If these privileges were sufficient**, it would have been unnecessary to enact Section 102(c).

Brief of Petitioner at 39 n.34 (emphasis added) (No. 86-1294).

proposition. In *Guong*, the *court* determined that the case could not proceed without disclosing classified information, although it did so without insisting on the formalities of the state secrets privilege, because in the *court's* view, formal assertion of the privilege would not alter its conclusion. This is consistent with footnote 26 in *Reynolds*. *Id.*

Guong did not involve constitutional claims. The plaintiff in *Guong* sought explicitly to enforce a secret contract, and the complaint divulged the terms of that contract, as well as the details of the alleged classified espionage activities. The plaintiff in *Guong* sought to litigate the details of his claim in district court, unlike the Does here, and revealed the names of individuals involved. It was in that context that the *court* concluded the case could not proceed without the classified information. Thus, even if *Guong* stood for the proposition that it is the Executive who decides whether a case can proceed without disclosure of state secrets, and it does not, it is not remotely analogous to this case, where the Does do not seek to enforce a secret contract, where their complaint alleges no classified facts, and where they seek an internal agency forum for their substantive claims.

The Executive's misreading of *Guong* as jurisdictional is confirmed by a later case from the same circuit, *Air-Sea Forwarders, Inc. v. United States*, 166 F.3d 1170 (Fed. Cir. 1999). There, the Federal Circuit expressly declined to affirm the lower court's dismissal of a breach of contract claim against the CIA as barred by *Totten*, instead affirming on the ground that the claim was barred by a prior settlement. *Id.* at 1172. By reaching the merits of the contract issue, the *Air-Sea* court made clear that it did not consider *Totten* jurisdictional. *See also McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003) (discussing *Totten* in context of the state secrets privilege).

In *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356 (Fed. Cir. 2001), the Federal Circuit again rejected the Executive's attempt to transform *Totten* into a jurisdictional bar. In that case, the Executive moved to dismiss on the ground that *Totten* barred a suit alleging a breach of contract involving secret CIA actions. *Id.* at 1358 The trial court denied the motion and the Federal Circuit affirmed, citing with approval the trial court's reasoning that the plaintiff

should be given the opportunity to make a case without the privileged information. *Id.* at 1360.

The Executive's reliance on *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 149 (1981), is misplaced. The case was decided on the ground that Congress had determined statutorily what information could be released, not by application of *Totten*. The passing citation to *Totten* was not the basis of the decision but rather, as the Ninth Circuit noted, an explanation by way of analogy about why the inquiry could not go forward in the court. (App. 28a-29a)

Circuit courts around the Nation have refused to accept the Executive's effort to transform *Totten* into a separate "doctrine" of jurisdiction. *See, e.g., Clift v. United States*, 597 F.2d 826 (2d Cir. 1979) (rejecting the Executive's *Totten* argument, concluding that the district court "acted too precipitately in dismissing the complaint," *id.* at 827, and holding that the plaintiff should have an opportunity to pursue the case without the secret evidence, *id.* at 830); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268 (4th Cir. 1980) (*en banc*) (rejecting *Totten* argument and affirming dismissal only after reviewing classified affidavit submitted in support of the assertion of the state secrets privilege); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1244 (4th Cir. 1985) (affirming dismissal only after review of classified declaration filed in support of the privilege).

F. *Totten* Does Not Support the Executive's Extreme Position

Even if the Court were to put aside the legal developments of the last century and a quarter and treat *Totten* as an independent basis for dismissal, rather than as part of the state secrets privilege, the case would not support dismissal of the Does' case on jurisdictional grounds.

In *Totten*, the plaintiff sought to enforce a contract for espionage services, and the complaint disclosed the identity of the alleged spy and the details of his covert mission. *See Totten*, 92 U.S. at 105-06. The Court dismissed the action on the ground that the public disclosures in the complaint breached the alleged contract and thus prevented its enforcement. By contrast, the Does bring an action for violation of their constitutional rights. Their complaint does

not disclose classified information, does not seek enforcement of a contract and does not seek adjudication of their substantive claims in court, but rather within the Agency. It is indeed far from self-evident that the *Totten* Court would have dismissed a case like the Does—in which the complaint seeks a secure nonpublic forum in which to have their claims fairly considered, does not reveal state secrets and does not seek to enforce a secret contract.

The Executive insists that *Totten* stands for the more general principle that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would *inevitably* lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." (Pet. Br. at 11 (quoting *Totten*, 92 U.S. at 107) (emphasis added))

In *Totten*, the Court decided that the case could not go forward. Whatever can be said of *Totten*, it assuredly does not stand for the proposition that the Executive can deprive a court of subject matter jurisdiction based on nothing more than its naked assertion that this is necessary, when the court itself is unpersuaded that state secrets are at issue. Not only is *Totten* by its own terms limited to cases in which the court considers disclosure of state secrets to be inevitable, the case does not even purport to address what procedures are appropriate when colorable constitutional claims are asserted.

While it is the prerogative of the Executive to assert the state secrets privilege, it is the responsibility of the Judiciary to make the determination whether the case can proceed. The district court here found that, on the existing record, it was not inevitable that state secrets would be disclosed. (App. 106a-107a) Perhaps that decision will change if the Executive asserts the privilege. This Court should not remove that function from the district court.

G. The State Secrets Privilege Is Fully Adequate to Accommodate the Executive's Concerns, and the Executive Fails to Show Otherwise

The Executive opposes an individualized evaluation of the risks of disclosure on a case-by-case basis in favor of an automatic rule of dismissal, regardless of whether a case

could, in fact, proceed without the disclosure of state secrets. A similar paradigm was recently rejected by this Court:

> [T]he position that the courts must forego any examination of the individual case and focus exclusively on the legality of the broader . . . scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government.

Hamdi, 124 S. Ct. at 2650 (emphasis omitted).

Although the Executive purports to confine its rule of judicial exclusion to cases touching on "espionage relationships," it has demanded deference on the basis of national security in cases spanning from the military use of dolphins, *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985), to nuclear weapons storage, *Weinberger v. Catholic Action of Haw./Peace Educ. Project* 454 U.S. 139 (1981), to the presence of hazardous waste at a secret air base, *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998).

The Executive itself hints at the potential breadth of the rule it proposes when it suggests that "[o]n a practical level, *Totten* also serves the national security mission of the CIA *and other intelligence agencies*" (Pet. Br. at 33) (emphasis added), and that *Totten* is not confined to contract claims and should operate as a jurisdictional bar whenever the Executive believes the "secret nature of the underlying relationship" is implicated. (Pet. Br. at 26) The Executive advocates a slippery slope indeed and a substantially diminished role for the Judiciary resulting in the concentration of power in the Executive Branch.[14]

---

[14] Further, a secret or espionage relationship could be asserted to exist in a broad range of Executive interactions. How would the Executive's proposed rule of judicial exclusion apply to an "espionage relationship" that was really more coercive—perhaps more akin to detention? How would it apply if the secret relationship is a result of governmental duress, or if the secret being kept is governmental misconduct? Under the Executive's approach, the judiciary would be precluded even from deferential and nonpublic consideration of whether a case could proceed, based on nothing more than the statement of a mid-

The Executive justifies this momentous departure from traditional constitutional principles because it would better serve the "CIA's interests" and because such a rule avoids inconvenience and "greatly preserve[s] the CIA's resources."[15] (Pet. Br. at 32-34) Not surprisingly, the Executive does not cite one case that inconvenience or "resources" can trump the constitutional obligation of the Judiciary. Such arguments are in any event immaterial to jurisdiction.

Perhaps to blunt the constitutional difficulties in its position, the Executive asserts that the Does are not without "remedies." (Pet. Br. at 21) The Executive's representation to this Court about the availability of recourse to the CIA's Inspector General is not supported by the record and, in this case at least, is misleading.[16] The Executive made the same argument in its Petition. (Pet. for Writ at 12) After the Petition was filed, the Does reminded the Executive that the Does had requested IG review of their case but no review had occurred. The Does asked the Executive to withdraw the argument. The request was ignored, and the Executive reiterates the same argument in its latest brief.

The Executive also assures this Court that spies can protect their own interests by "seek[ing] certain assurances about the extent to which the Agency will provide a fair process to review any dispute." (Pet. Br. at 29) As a practical matter, the notion that the Does could have protected themselves by requesting "certain assurances"—precisely what they did—makes no sense given the Executive's

level official from an intelligence agency that the case involved an espionage or secret relationship.

[15] Putting aside the limited nature of the *Reynolds* requirements, particularly when contrasted to the potential loss of a remedy when the privilege is sustained, the Executive fails to offer any support for the notion that asserting the privilege would be burdensome in this case and only speculation that it would be burdensome in others.

[16] At the time the Does filed their appeal to the DCI in late 1997, they also requested an independent review by the Agency's Inspector General. (App. 130a-131a; R.App. 20) An IG review did not occur. A subsequent request by the Does for IG review was not responded to. To the Does' knowledge, their requests did not result in any review by the IG. Nor has the Executive ever asserted that such a review occurred. (*Id.*)

position that the Does are outside the law and that any assurances therefore are meaningless.[17]

The Executive also repeatedly and erroneously insists that requiring compliance with the state secrets privilege will force the Executive to disclose the "details" of the Does' relationship to the Executive. (Pet. Br. at 9, 22, 24-25, 40) This is a red herring. The state secrets privilege is designed precisely to prevent disclosures that harm the national interest. *Reynolds* is explicit in this regard. It makes clear that the Executive need not divulge the details of the matter at hand to invoke the privilege. Rather, the Executive need only provide the district court a sufficient explanation to allow the court to conclude that the privilege is asserted for a legitimate purpose and that state secrets are at risk. *Reynolds*, 345 U.S. at 9-10 (explaining that complete disclosure is not required to invoke the privilege). Perhaps it is the fear that it could not sustain this minimal burden in this case that causes the Executive to take such an extreme position.

In this case, the Ninth Circuit clearly did not contemplate that assertion of the privilege would require any detailed revelations by the Executive. The Court of Appeals only noted that the Executive could not avoid a "minimally coherent explanation to the court" as to how simply admitting a relationship with the unnamed Does in this case, given the absence of classified or even identifying information in the complaint or other filings, could "conceivably jeopardize national security." (App. 36a-37a) Moreover, in asserting the privilege the Executive can make use of a full panoply of protective measures, including filing under seal, which can protect even the subject matter of the filing. Other measures are available as well, including redacted filings and *in*

[17] The Executive maintains that the Does are outside the law (Pet. Br. at 26) (arguing that the Does have no "recognized position" according to domestic law). The Executive does not have authority to declare United States citizens to be outside United States law. Not surprisingly, the Executive's contention on this point is wholly unsupported. The Executive relies on secondary sources that discuss the status of spies captured abroad (Pet. Br. at 26) (citing L. Oppenheim, *International Law –A Treatise* 862 (8th ed. 1955)), a circumstance not remotely analogous to the situation of the Does, who are United States citizens residing in the United States.

camera review,[18] as the Ninth Circuit noted. The availability of these measures refutes the Executive's contention that the very assertion of the privilege compromises national security and that "the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency." (Pet. Br. at 35-36)

The Executive erroneously equates assertion of the state secrets privilege with *public* disclosure. The state secrets privilege does not require public disclosure. The Executive's reliance on *CIA v. Sims*, 471 U.S. 159 (1985), which dealt with disclosure of classified information to the *public* under the Freedom of Information Act, is therefore inapposite. The Executive cites *Sims*, 471 U.S. at 176, for the proposition that "forced disclosure of the identities of [the CIA's] intelligence sources" would be harmful to national security. (Pet. Br. at 16) The Does do not contest this, as already noted. The issue presented in this case is not the forced public disclosure of classified information, but rather the limited requirement that the Executive provide the district court some support for its contention that state secrets will be revealed if this case goes forward—an assertion that can be made in a sealed filing or *in camera* to the court, and one the Ninth Circuit recognized would be entitled to great deference. (App. 36a) Similarly, the Does do not propose, nor do they wish, to disclose classified information in "open court," as the Executive implies. (Pet. Br. at 4)[19]

---

[18] *See, e.g., Kerr v. United States District Court for N. Dist. of Calif.*, 426 U.S. 394, 405-06 (1976) (citing, *e.g., Nixon*, 418 U.S. at 706; *United States v. Reynolds*, 345 U.S. 1 (1953)). *See also Webster*, 486 U.S. at 604 (citing *Kerr* and *Reynolds* with approval in the context of a case brought against the CIA by a covert CIA operative).

[19] The Executive's reliance on other FOIA cases, and other cases considering *public* disclosures of classified information, suffers from the same defect as its reliance on *Sims*. Moreover, such cases demonstrate the Executive's compliance with the requirements of judicial review in other cases, whether for FOIA exemptions or for the Executive's invocation of the state secrets privilege, including with respect to the CIA, and involving highly sensitive matters. For example, in *Military Audit Project v. Casey*, 656 F.2d 724, 745 (D.C. Cir. 1981), a case involving the CIA's alleged involvement with Hughes' *Glomar Explorer* expedition, the court carefully considered whether the Agency had established that the information sought properly could be withheld under a statutory exemption, which review included *in camera* consideration of detailed affidavits from agency senior officials. Similarly, *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978), appeal after remand, 690 F.2d 977 (D.C. 1982) was decided only after the court evaluated the Executive's assertion of the state secrets privilege. These cases make clear that it is the *court* that must make the critical determination, not the Executive on its untested, unilateral assertion.

The Executive also attempts to justify a jurisdictional bar on the ground that it is necessary to prevent a judicial forum for "graymail." (Pet. Br. at 33-34) This argument is weak to say the least. The Executive extols the "benefits to the CIA" of a rule that denies access to the courts by "individuals who have *real* or perceived grievances." (Pet. Br. at 33) (emphasis added) But a disaffected individual is not limited to a judicial proceeding to engage in such conduct. Indeed, the federal courts would hardly seem the most advantageous forum in which to threaten the United States government. Given the multiple alternative channels for disclosure of state secrets—including the news media, publishing houses, the Internet, even enemies of the State—it defies reason to suggest that precluding jurisdiction is an antidote to graymail.

In support of its graymail argument, the Executive contends that it is not the disclosure of state secrets in a complaint (which a jurisdictional bar would not prevent) that endangers national security, but rather assertion of the privilege that does so. This notion also defies common sense and the long history of the privilege.

The assumption that *Totten* must be read as an absolute bar to prevent the disclosure of state secrets also ignores existing constraints on the revelation of such information, including criminal sanctions. *See* 18 U.S.C. §§ 793-794 (criminalizing such disclosure). In addition, individuals in covert relationships typically fear for their lives and do not want their identities made public, as is the case of the Does who live under assumed identities. Finally, as already discussed, courts are required to treat assertion of the privilege with appropriate deference and have established procedures for sealed filings, and *in camera* or ex parte submissions and proceedings. These constraints, not a jurisdictional bar, have long served to prevent disclosure of classified or other sensitive national security information in the courts.

H. The Court's Decision in *Webster* Refutes the Executive's Premise That the Judiciary Cannot Perform Its Constitutional Function in Cases Involving the CIA and Its Covert Intelligence Activities

The Court's decision in *Webster v. Doe*, 486 U.S. 592 (1988), refutes the Executive's contention that there is an exception to the state secrets privilege for claims touching upon an espionage relationship. (Pet. Br. at 8, 22) *Webster* involved constitutional claims by a former CIA covert electronics technician for alleged discrimination based on sexual orientation. Although the Court held that pursuant to statutory authority the DCI had absolute discretion to terminate an employee and that such decisions were not reviewable under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2), 486 U.S. at 599-602, the Court also held that a person who had a secret relationship with the CIA and presented colorable constitutional claims could go forward and litigate them.

In *Webster*, the Court rejected the CIA's argument that the plaintiff's constitutional claims were nonreviewable, noting the "'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* at 603 (citing *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). In so ruling, the Court noted that "the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Id.* at 604.[20]

The Does' case is stronger than the plaintiff's case in *Webster*. In *Webster*, the plaintiff sought an adjudication of his substantive claim in the federal district court. By contrast here, the Does request that substantive consideration of their claims for assistance and personal security occur in an *internal* Agency forum, and that the internal hearing comply

[20] The record here does not contain a single assertion by the CIA that the *Webster* proceedings resulted in any disclosure of secrets or any other problem, except perhaps the CIA's alleged inconvenience.

with due process and apply substantive law. In addition, *Webster* included the issue of whether Congress had precluded judicial consideration of the claim asserted. *Id.* at 606 (O'Connor, J. dissenting). Here, there is no such congressional action. Rather, the issue is whether the Executive has the authority unilaterally to preclude even deferential judicial consideration of whether a case may proceed without disclosure of state secrets.

The Executive has conceded in its failed attempt to distinguish *Webster* that "[a]s long as a covert CIA employee's name is not identified, certain aspects of his or her activities . . . can be revealed or litigated without necessarily exposing classified information." (Pet. for Writ at 14 n.4) The same is true here. The Does have proceeded, like the plaintiff in *Webster*, using pseudonyms. The key issues of the Does' age, health and financial need can be revealed without exposing classified information.

The Executive attempts to distinguish *Webster* from this case on the ground that the plaintiff in *Webster* was a covert CIA employee, which it contends is "meaningfully different" from a non-employee espionage agent, as far as security implications and historical treatment. (Pet. Br. at 39-40) This distinction lacks merit, reason, and record support. A more appropriate distinction would be between a person acting for the CIA in a covert capacity and a person openly acting for the CIA (of which there are many).

The Executive's inference that the *Webster* plaintiff's relationship with the CIA or his work on behalf of the CIA was any less secret or sensitive than the Does is not supported by the record. The fact that the employee in *Webster* was covert[21] presumptively indicates that he was engaged in covert activities abroad, consistent with the CIA's foreign intelligence mission.[22] Whether the Doe in *Webster*

[21] Covert is synonymous with secret and a covert agent or employee is presumptively no different than a "spy." They both have a secret relationship with the CIA and undertake secret missions. *Guong*, 860 F.2d at 1065 ("secret and covert are synonymous").

[22] The Ninth Circuit posited that the "only obvious differences between *Webster* and this case for present purposes is that the Doe in the *Webster* case was a domestic employee while the Does in this case are foreigners who were engaged to spy for the United States abroad." (App. 34a) However, the *Webster* opinion does not state that the plaintiff

worked domestically or overseas, the fact that he was a covert employee puts him in the same category as the Does—persons carrying out secret duties for the CIA undercover.

In addition to the lack of record support or logic for the Executive's attempt to distinguish *Webster* on the basis of employee or non-employee status, and the equal protection concerns such a distinction would raise, the Executive's own *Webster* briefing demonstrates that the distinction is meritless. In *Webster*, the Executive urged dismissal of the case on national security grounds and characterized *Totten* as a case involving "breach of an employment contract" concerning espionage activities.[23] This completely undermines the Executive's position here that whether a person is an employee or a non-employee is material in determining whether the case may go forward.

The Executive's attempts to distinguish *Webster* are meritless. *Webster* squarely supports the Does and the Executive fails to show otherwise.

I. The Record of the Executive's Conduct in This Case Cautions Against Granting the Executive the Absolute Authority It Demands.

The record of the Executive's conduct in this case demonstrates the dangers of acceding to the Executive's request for unreviewable authority. For example, the Executive initially denied in the district court—and denied categorically—the existence of any law or regulation that provided a basis for assistance to the Does. These representations were untrue, as made clear by the Executive's later admissions and by regulations subsequently produced by the Executive.

More particularly, in response to the Does' allegations regarding what they were repeatedly told by CIA officials over a period of years about the existence and requirements

in that case was a domestic employee. Nor does it refute the presumption that the *Webster* plaintiff was engaged in foreign espionage on behalf of the CIA.

[23] *Webster*, 486 U.S. at 592, Brief for Petitioner at 39 n.33 (No. 86-1294).

of the PL-110 program,[24] as well as plaintiffs' citation to testimony presented to the United States Congress about the PL-110 program, the Executive initially represented to the district court:

> [W]hat Plaintiffs refer to as "PL-110" does not in any way obligate the CIA . . . to furnish Plaintiffs life-long **financial or other assistance.**[25]
>
> What they [plaintiffs] refer to as "PL-110" is almost certainly 50 U.S.C. § 403h. That statute . . . merely provides for the admission of a limited number of aliens into the United States each year. . . . The statute is completely silent regarding any obligation, **financial or otherwise**, imposed on the government with respect to aliens admitted to the United States under its provisions.[26]
>
> . . . .
>
> Accordingly, to the extent the Plaintiffs have a protected property interest in the financial assistance they seek, **the only source of such arguable entitlement** must be their alleged oral/written agreements with the CIA . . . .[27]
>
> . . . .
>
> [P]laintiffs allege that one or more of their CIA contacts "continually assured" them that "the Agency's PL-110 program" guaranteed plaintiffs continued financial support . . . . Any

[24] *See* Second Amended Complaint, App. 117a-142a, ¶¶ 4.4, 4.12, 4.13, 4.16, 4.17; John Doe Decl., R.App. 1-17, ¶¶ 3-6, 10, 12, 17.

[25] Memorandum by defendants in support of Motion to Dismiss for lack of subject matter jurisdiction, or alternatively, for failure to state a claim at 8, Docket Number 5, United States District Court Docket Entries, J.App. 8 (emphasis added).

[26] *Id.* (emphasis added) (attaching a copy of 50 U.S.C. § 403h).

[27] *Id.* (emphasis added).

> such alleged assurance **amounts to nothing more than a part of the secret bargain** the CIA was allegedly attempting to strike with plaintiffs.[28]
>
> Plaintiffs' **sole basis** for their self-serving, extra-textual interpretation of PL-110 is a single sentence in the 1987 congressional testimony of William Geimer . . . . That testimony is inconsistent with the wording of the statute, does not purport to reflect CIA policy, and is in no way binding on the United States.[29]

These representations led the district court to observe in denying the first Executive motion to dismiss that "Defendants claim in their brief not to know what 'PL-110' refers to, but believe it is a reference to 50 U.S.C. § 403h which imposes no obligation of assistance on the government." (App. 98a n.3)

Having failed to obtain dismissal of the case, the Executive filed a "Motion for Summary Judgment or in the Alternative, Renewed Motion to Dismiss," in which it emphatically stated:

> The Federal Defendants wish to make the record crystal clear with respect to PL-110. As the attached McNair Declaration **unequivocally** states, there is **no** regulation (either internal or external), **no** statute, and **no** written or unwritten CIA policy or practice that entitles plaintiffs, or any alleged defector, to life-long financial benefits. . . . Nor did such a policy exist at the time plaintiffs allegedly defected, or in the interim period. . . . Because none exists, plaintiffs have not and will not cite any authority to the contrary to

[28]Reply by defendant to Response to Motion to Dismiss at 4, Docket Number 20, United States District Court Docket Entries, J.App. 12 (emphasis added).

[29] *Id.* at 4-5 (emphasis added).

> this Court. Accordingly, any suggestion plaintiffs' supposed entitlement to a property interest in life-long financial assistance derives from PL-110, or any implementing regulations promulgated thereunder, has no basis whatsoever in fact or in law.

Memorandum by defendants USA in support of Motion for Summary Judgment, or, in the alternative, Renewed Motion to Dismiss at 4-5, Docket Number 30, United States District Court Docket Entries, J.App. 14 (emphasis in original).

In support of its "renewed" motion to dismiss, the Executive submitted the McNair Declaration (App. 143a-148a), which in stark contrast to the Executive's earlier representations to the Court, admitted that 50 U.S.C. § 403h is "commonly known as 'PL-110'" (App. 144a) and that:

> [t]here is an agreement between the CIA and the Department of Justice in which CIA promised to DOJ that CIA would ensure that individuals whom the CIA brought into the United States under the authority of PL-110 would not become public charges before such time that they either attained United States citizenship, or were eligible to become United States citizens. **The Agency has a regulation to this effect as well.** [30]

After being served with a copy of the McNair Declaration, the Does sought production under Fed. R. Civ. P. 34 of the agreement referenced in the Declaration between DOJ and CIA covering PL-110 participants, and regulations

[30] McNair Decl., App. 145a ¶ 6 (emphasis added). The Does moved to strike portions of the McNair Declaration (R.App. 33-38) on four grounds, including that Mr. McNair was unable to identify in his deposition which portions of the declaration were based on his personal knowledge and which parts were language provided by attorneys (R.App. 34-35), and that the declaration constituted a legal opinion he was not competent to offer. (R.App. 36-37) The district court disregarded the legal conclusions. (App. 88a n.6) The Does object here on the same grounds as in their motion to strike in the district court.

governing PL-110 program participants. The Executive produced redacted versions of certain CIA regulations and related documents.[31] (R.App. 41-50) The following two redacted portions of these documents are particularly instructive, as they contradict the Executive's prior representations to the court:

> *Letter From CIA to DOJ, December 12, 1988*
>
> I am writing to request your assistance in revising certain understandings made in a 1949 letter to the Attorney General by then DCI Admiral Hillenkoetter concerning CIA commitments to those aliens permitted entry into the United States under the provisions of 50 U.S.C.A. 403h. . . .
>
> Certainly, the CIA believes it has an **obligation to support** each of its [redacted] for a reasonable period of time and, **in some cases, based upon unique circumstances such as illness, age, or indigency, this commitment may be for life.**
>
> *CIA Regulations, Section B, item c. (4)-(6) date: 06/23/81*
>
> As a general rule, CIA financial support for [redacted] should cease as soon as possible. . . . **CIA may continue to provide financial support** to [redacted] even after [redacted] has obtained citizenship or resided in the United States for 10 years, **if [redacted] determines that such support is necessary. The safety and security of [redacted] are continuing responsibilities of CIA**
>
> . . . .

(R.App. 43-44, 50 (emphasis added))

[31] Prior to this, the parties had agreed to refrain from discovery until the jurisdictional issue was resolved. However, once the Executive moved under Fed. R. Civ. P. 56 and offered what it maintained was "evidence," the Does were compelled to engage in limited discovery to support their response.

In denying the Executive's second motion, the district court noted:

> [i]n their first motion to dismiss, defendants claimed not to know what PL-110 was. Now, they acknowledge not only the existence of PL-110, but also the existence of CIA internal regulations concerning the PL-110 program and the financial benefits accorded to defectors. . . . Defendants' initial denial of knowledge of PL-110, followed by their subsequent acknowledgment of PL-110 and related regulations, weaken their credibility.

(App. 87a-88a) The record of the Executive's conduct in the district court with respect to PL-110 establishes that the Agency made material misrepresentations to the court.

Also illustrative of Agency conduct is the arbitrary "process" the Does received. Among other deficiencies, the Agency misrepresented to the Does' counsel the standard for requests by persons such as the Does for additional assistance from the Agency. The Agency misrepresentation that the standard is the "value of the services" performed rather than the correct standard of age, health and indigency totally compromised any chance the Does' appeal had of succeeding on the merits. The Agency also refused to provide pertinent PL-110 regulations, but later, for its own purposes, disclosed them openly in court. The Agency refused to provide regulations defining the appeal procedures and supplied inconsistent verbal advice.

In addition, the Agency's failure to respond to inquiries, its refusal to allow the Does or their counsel to attend the Does' hearing and its refusal to allow access to relevant materials, including the Does' counsel's own notes, together with other procedural defects, demonstrate the lack of any semblance of fair process. Further, the Executive's representation that redress for the Does is available through the Agency Inspector General (Pet. Br. at 21), when the

Executive lawyers were reminded that the Does had attempted to get the IG involved in the Does' case and were ignored, also is misleading at best.

The record in this case amply illustrates the excesses to which the Executive may be prone when it considers itself insulated from the obligation to comply with the law. The Court may find this record illuminating when considering whether this case is an appropriate vehicle in which to expand the scope of the Executive's unreviewable authority.

IV. CONCLUSION

This Court should reject the Executive's extreme position that the Executive Branch has absolute and unreviewable power to unilaterally terminate a judicial case alleging colorable constitutional claims. The Executive claims that courts are institutionally incapable of dealing with cases that touch upon matters of national security. History demonstrates the contrary, and the Court so ruled in *Reynolds*, *Hamdi*, and other cases. The Constitution prescribes to the Judiciary a coordinate obligation with the two other branches to protect an individual's constitutional right to due process. This Court should reject the Executive's attempt to create a new rule of judicial exclusion that concentrates Executive power in a manner that compromises the Judiciary's own constitutional obligations.

Totten does not command the result advocated by the Executive and neither does *Reynolds*, nor does the Constitution permit it. *Totten* is a privilege case, not a case authorizing denial of subject matter jurisdiction by Executive Branch fiat.

The record in this action demonstrates a complete lack of any risk to national security from the Does' case. Nothing has been or will be publicly filed in a court by the Does without prior approval by the CIA. Moreover, as a result of the CIA's belated admissions, it is now known that the standard governing the Does' case relates to their age, health and indigency and does not involve the details of espionage missions for the United States. Any concern over the confirmation of a relationship between the Does and the CIA is nullified by the Does' use of pseudonyms, a fact essentially admitted by the Executive. Any remaining concerns can be addressed by such procedures as having certain portions of

the district court proceedings *in camera* or under seal. Certainly nothing about the Does' case will require a public appearance by them. The Does have at least an equal interest in total security due to the remaining threat of retaliation, including assassination, posed by the Does' former country's secret service.

Should this Court affirm, the opinions below demonstrate that appropriate deference will be given to any assertion of the state secrets privilege by the Executive. The Ninth Circuit's decision specifically requires that the CIA be permitted to assert the state secrets privilege after remand and before any other case activity. The Ninth Circuit opinion also recognizes the possibility that the Does' case must yield to the greater good if the district court concludes, after assertion of the state secrets privilege, that the case cannot proceed without disclosing state secrets. But for now, in the absence of an assertion of the privilege by the Executive, the district court found, and the Ninth Circuit agreed, that it was *not* inevitable that the Does' case would disclose state secrets.

Respectfully, the Court should affirm and remand to the district court for further proceedings.

RESPECTFULLY
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In the Supreme Court of the United States

GEORGE J. TENET, INDIVIDUALLY, PORTER J. GOSS, DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND UNITED STATES OF AMERICA, PETITIONERS

v.

JOHN DOE AND JANE DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

No. 03-1395

GEORGE J. TENET, INDIVIDUALLY, PORTER J. GOSS, DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, AND UNITED STATES OF AMERICA, PETITIONERS

v.

JOHN DOE AND JANE DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondents do not and cannot dispute that their suit in its entirety is premised on, and presupposes, the existence of an espionage agreement with the CIA. Respondents accordingly offer no explanation of how they can recover on *any* of their claims without being able to prove and obtain a judicial order that, in fact, respondents were espionage agents for the CIA and that respondents had entered into an agreement under which the CIA promised lifetime financial assistance and certain assurances of fair process in exchange for their espionage services. But inherent in any espionage agreement is that the agreement will remain forever secret and that the employing sovereign may deny the agreement and any association with the agent. Such principles render the agreement extra-legal and therefore unenforceable in any court.

Those principles, which form the foundation of the Court's decision in *Totten* v. *United States*, 92 U.S. 105 (1876), re-

main necessary to safeguard our national security and promote effective foreign relations. The *Totten* doctrine does not, as respondents suggest, rely on any unreviewable executive determination, but rather requires the courts to dismiss claims, either sua sponte or on the government's motion, that by their nature presuppose a classified fact—the existence or details of a secret espionage agreement. Respondents' suit is just such an action. The suit is incompatible with the nature of their purported agreement with the CIA and the historical and routine practice of the United States to refuse to confirm or deny the existence of such agreements. Respondents' suit is thus barred by *Totten*.

A. *Totten* Applies To All Of Respondents' Claims

Respondents argue that *Totten*'s categorical bar to suits by espionage agents seeking compensation for past services does not govern this suit because respondents have not brought a breach of contract claim for money damages as did the alleged spy in *Totten*. But, while respondents emphasize their claims to force the CIA to provide an enhanced internal process, they also seek monetary relief pursuant to an estoppel theory. Respondents' estoppel claims are indistinguishable from the claims in *Totten*. Moreover, their due process claims are also controlled by *Totten* because they are premised on the existence of a secret espionage agreement and seek to enforce assurances they claim the CIA made about its internal process.

1. Totten *bars respondents' estoppel claim*

Respondents' estoppel claim for monetary relief is in all material respects identical to the breach of contract claim brought by the alleged spy in *Totten*, who sought promised compensation for espionage services during the Civil War. Here, respondents seek monetary relief based on the CIA's alleged promises of assistance in exchange for espionage services during the Cold War. Respondents acknowledge

that "[t]heir request does include financial assistance." Br. 16. Indeed, their complaint demands a specific monetary award based on levels of financial support that they allege were previously provided by the CIA. Pet. App. 138a; see also Br. in Opp. App. 4-5 (Affidavit of John Doe) (alleging specific levels and types of financial support and benefits given by the CIA). Such claims for relief cannot be sustained without proof that an agreement to provide compensation for espionage services existed and that the CIA made enforceable promises with respect to the levels and length of compensation. See, *e.g. Cyberchron Corp.* v. *Calldata Sys. Dev., Inc.*, 47 F.3d 39, 43 (2d Cir. 1995) ("the first element of promissory estoppel is a clear and unambiguous promise"); accord *Aguilar* v. *International Longshoremen's Union Local # 10*, 966 F.2d 443, 445-446 (9th Cir. 1992).

Whether framed as estoppel or a claim for a breach of contract, *Totten* forecloses any request for monetary relief that is based on the government's alleged promise to pay for espionage services. The Court in *Totten* held that every espionage agreement implicitly includes a term that the spy may never seek to enforce the terms of that agreement against the United States in "*any* suit in a court of justice." 92 U.S. at 107 (emphasis added). *Totten* reasoned that adjudication of such claims by former spies would conflict with the parties' implicit agreement to keep the entire matter secret "for ever" and would necessarily disclose whether a secret agreement existed and the details of that agreement. *Id.* at 106-107. *Totten* also recognized the practical reality that the United States cannot conduct successful espionage activities and maintain effective foreign relations if alleged spies were permitted to prove (and thereby publicly disclose) that the United States had employed them to steal secrets from the enemy. *Ibid.*

The Court's reasoning in *Totten* is confirmed by the secrecy that has historically surrounded espionage relationships in this country, and the international acceptance around the globe that a country need not, and traditionally does not, acknowledge its employment of spies. Thus, since our Nation's inception, espionage relationships have, by necessity and by their nature, been treated as secret in order to protect the overarching national security and foreign policy interests of the United States. That secrecy prevents respondents from seeking a judicial order awarding monetary relief for alleged past espionage services. U.S. Br. 11-21.

2. Totten *bars respondents' due process claims*

Respondents also argue that *Totten* does not bar their claim that the Due Process Clause entitles them to a judicial order compelling the CIA to adopt and apply fair internal procedures for resolving compensation grievances by alleged former spies. Br. 16, 29-30. But that request for relief is, if anything, more objectionable than the request for monetary relief at issue in *Totten*. Respondents' "process" claims either require specific performance of the promises the CIA allegedly made to them about procedural protections or would involve the judiciary in determining what procedures the CIA must employ to resolve complaints of unacknowledged espionage agents who are dissatisfied with the level or extent of money paid to them for past spy services conducted overseas. Such a suit invites courts to second-guess the CIA's tradecraft methods in recruiting, maintaining, compensating, and terminating spies and would chill CIA case officers from conducting effective espionage operations. The suit accordingly would significantly intrude into the Executive Branch's constitutionally entrusted role in employing spies to protect national security and in making judgments about what promises and internal procedures are

necessary to induce cooperation from an optimal number of human intelligence sources abroad. U.S. Br. 22-25.

Respondents' constitutional claim, like respondents' estoppel claim, also is premised on a secret fact or facts, *i.e.* the existence of an espionage relationship and perhaps the procedures or standards agreed upon to govern that relationship. Respondents' ability to obtain a court order modifying the CIA's internal procedures for handling complaints depends on either specific "assurances" that such procedures would be available (Resp. Br. 32) or, at a minimum, on the existence of a secret espionage relationship that would give respondents a basis to complain about the lack of appropriate procedures. In either event, respondents' process claims depend on the existence or details of a secret espionage agreement. As the Ninth Circuit twice observed, in order to establish any entitlement to procedural due process, respondents *must* prove, and a court *must* determine, that respondents in fact spied for the United States. Pet. App. 37a (requiring district court to engage in an "evidentiary inquiry * * * to determine whether the alleged relationship with the CIA in fact existed and, if so, whether the resulting relationship gave rise to a legally cognizable property or liberty interest."); accord *id.* at 35a ("to make out their procedural due process claim, [respondents] will need to demonstrate * * * that they had a relationship with the CIA that could potentially establish an entitlement to continued assistance of payments"). Respondents have not contended otherwise.

The Court in *Totten* specifically held that spies "must look for their compensation to the contingent fund of the department employing them, and to such allowances from it as those who dispense that fund may award," and that "[t]he secrecy which such contracts impose precludes any action for their enforcement." 92 U.S. at 107. After *Totten*, these limitations must be regarded as inhering in every agreement

to perform espionage, and the payment of compensation and the procedures for dispensing such payments from the contingent fund accordingly must be viewed as matters traditionally committed to agency discretion by law. See *e.g.*, *Lincoln* v. *Vigil*, 508 U.S. 182, 191-193 (1993). The existence of internal procedures to assist the Agency in evaluating compensation claims does not affect the basic discretionary nature of the determination or confer private, or judicially enforceable rights on spies.

The paramount considerations underlying *Totten*, accordingly, refute any claimed expectation on the part of respondents that their alleged agreement with the CIA would give rise to any legally enforceable rights or that respondents could pursue in court their alleged displeasure with the CIA's internal procedures for processing compensation claims by former spies. In short, the secrecy inherent in, and vital to, any espionage agreement forecloses any judicial adjudication of respondents' constitutional claims for "fair" procedures because those claims are necessarily premised on, and completely inconsistent with, the existence of an alleged secret agreement. U.S. Br. 13-21.

Respondents fail in their attempt to distinguish themselves from espionage agents who, under international law, have no recognized legal position or means of redress against the government employing them. Respondents observe that they were not "captured abroad" and are now "United States citizens residing in the United States." Br. 33 n.17. But the alleged spy in *Totten* was presumably a U.S. citizen and not captured and those circumstances did not give rise to legally enforceable rights. Here respondents' claimed rights stem from an allegation that the United States had promised them, then citizens of an enemy of the United States, lifelong benefits in exchange for conducting secret services abroad. Respondents do not dispute that, *had* they been captured abroad, they could have been severely

punished by their country of origin for their alleged activities without legal recourse to United States courts. See Resp. Br. 2 (alleging that their spying has "put[] them at lifelong risk of retaliation, including assassination"); accord Br. in Opp. App. 3 (Affidavit of John Doe). Implicit in all espionage relationships is that either party may refuse to acknowledge the relationship. The secrecy inherent in the relationship thus would have permitted the United States to refuse to confirm or deny any association with respondents. U.S. Br. 18-19. Indeed, that premise presumably would hold true today were respondents to return to their country of origin and their past alleged activities discovered. Cf. Pet. App. 136a (Comp. ¶ 5.21) (alleging that respondents risk being identified in "Eastern Europe" and "subjected to sanctions or blackmail"). The implicit term of the secret relationship that would entitle the United States to refuse to acknowledge the relationship in that dire situation, *a fortiori*, precludes respondents' effort to seek relief in United States courts that is necessarily premised on the same relationship.

Moreover, because respondents' due process claims are premised on the CIA's alleged failure to pay them sufficiently for their purported espionage services (or to provide sufficient process to vindicate their claims for payment), this case is readily distinguishable from the situation hypothesized by respondents in which a person has been physically detained or coerced by the CIA. Br. 31-32 n.14. In those situations, the alleged constitutional injury would not depend on any secret agreement with the CIA.

By contrast, respondents' claims are premised on the existence of an alleged *contract* in which respondents agreed to spy as an explicit *quid pro quo* for the CIA's assistance in bringing respondents to the United States and securing their citizenship and new identities. Thus, respondents allege that they approached "a person known to them to be

attached to the United States embassy and requested assistance in defecting to the United States" because they were "disenchanted with Communism." Br. 2. They further allege that CIA officials responded by stating that the Agency would agree to bring respondents to the United States only on the condition that respondents steal secrets from their country of origin over a period of time. Br. 2-3. Although respondents may have believed that "they had no real choice" (Br. 2) but to agree to perform espionage services in exchange for the CIA's assistance, respondents are merely describing the alleged terms of the CIA's offer, and the alleged bargain ultimately struck with the CIA. As the court of appeals explained, respondents allege that "although they were initially reluctant to conduct espionage activities, they eventually *agreed* to do what was *asked* of them. They allege that they carried out their *end of the bargain* but that the Agency has now reneged and abandoned them to fend for themselves." Pet. App. 3a (emphases added); see Br. in Opp. App. 2-3 (Affidavit of John Doe) (alleging that CIA agents had Agency approval "of the *offers* being made to us" and that "in reliance on the Agency's *promises* of assistance, we reluctantly *agreed* to work 'in place' for the United States conducting espionage activities") (emphases added); *Id.* at 3 ("After carrying out *our end of the bargain* at great personal risk for the requisite period, we requested that the Agency arrange for our defection and travel to the United States.") (emphasis added).

3. Webster *v.* Doe *does not require the CIA to answer respondents' due process claims*

Respondents also rely on *Webster* v. *Doe*, 486 U.S. 592 (1988), in arguing that *Totten* does not apply to their due process claims. Br. 36-38. *Webster*, however, did not involve an assertion that *Totten* required dismissal of the action, and the case did not involve alleged espionage agents who

claimed that the CIA's failure to compensate them gave rise to legally enforceable rights. Rather, *Webster* rejected an alternative threshold argument in favor of dismissal and held that an *acknowledged employee* of the CIA may bring colorable constitutional challenges to his termination from the Agency. *Id.* at 604-605. The Executive Branch did not invoke a *Totten* defense in *Webster*, and the rights of acknowledged employees raise quite different considerations from claims brought by those with no acknowledged relationship with the CIA. When there is an acknowledged employment relationship, claims invoking legal limits on how such relationship may be terminated do not depend on a classified fact, although the adjudication of such claim *may* implicate evidence protected by the state secrets privilege. The situation is quite different when the very fact of the relationship is secret. *Totten* involved the latter situation and respected the interest of the Executive Branch in not responding to or even acknowledging such claims. There is no basis for this Court to revisit *Totten* or the Executive Branch's consistent judgment throughout our history that the existence of an espionage relationship is classified and must remain secret. U.S. Br. 11-17.

The historical treatment of espionage agents also distinguishes respondents' suit from actions by acknowledged CIA employees, including those engaged in clandestine activities. Thus, in recognizing an employee's ability to bring constitutional claims against the Agency, the Court in *Webster* relied in significant part on the CIA's historical practice of litigating employment disputes under Title VII concerning the hiring and promotion policies of Agency employees. 486 U.S. at 604. We are aware of no post-*Totten* decision (and respondents cite none) that has permitted an alleged espionage agent to seek redress for the United States' failure to compensate the agent for overseas activities in stealing military

secrets from an enemy of the United States. Such a proceeding would be unprecedented.

B. Application of *Totten* To Respondents' Suit Does Not Violate Separation Of Powers Principles

Respondents also argue that applying *Totten* in this case would undermine the judiciary's role in safeguarding citizens' rights and ensuring that the Executive Branch is correct in asserting that state secrets would be divulged in any given case. Br. 18-23, 30-31. Respondents thus assert that the Court must insist upon the formal assertion and establishment of the state secrets privilege under *United States* v. *Reynolds*, 345 U.S. 1 (1953), rather than defer to "nothing more than the statement of a mid-level official" from the CIA that respondents' suit "involve[s] an espionage or secret relationship." Br. 31-32 n.14. Those arguments reflect a fundamental misunderstanding of the judicial role under both *Totten* and *Reynolds*.

The principles underlying *Totten* are fully consistent with the role of the judiciary in safeguarding the rights of citizens. It is, after all, the court, not the Executive in some act of unreviewable discretion, that must determine whether any given case is properly governed by *Totten*. That determination turns on whether the complaint on its face is premised on an alleged espionage agreement. *Reynolds*, 345 U.S. at 11 n.26. Here, that point is not open to serious dispute. The district court and the court of appeals thus should have ordered the complaint dismissed under *Totten*. Those courts erred not in failing to defer automatically to the Executive's invocation of *Totten*, but in failing to abide by this Court's binding precedent in *Totten*, which does not leave open to a district court the option of proceeding when *Totten* makes clear that the very nature of the suit carries with it unacceptable risks of the disclosure of classified information and therefore that the suit must be dismissed.

Respondents also seem to ignore that *Reynolds* involves, if anything, greater deference to Executive Branch judgments that information is classified. Once the Executive determines that certain information implicates state secrets, that information must be excluded. *Totten* involves the distinct question of whether the plaintiffs' claims necessarily implicate a secret espionage agreement. That is a question for the judiciary, but one that, in this case, admits of only one answer.

Application of *Totten* certainly involves no diminishment of the judicial role. Compensation disputes between alleged former spies and the CIA have *never* been the subject of judicial adjudication, and the Executive Branch throughout the Nation's history has compensated its spies in complete secrecy. U.S. Br. 22. Adjudication of respondents' suit, which seeks a specific award of compensation and an order detailing what internal procedures the CIA must employ for spy-compensation disputes, Pet. App. 138a-141a, would reflect an unprecedented reworking of the separation of powers. As the Court in *Totten* explained, 92 U.S. at 107, the extent of any remedy for former spies who are dissatisfied with the CIA's level and manner of compensation is vested in the Executive Branch, which has an obvious incentive to honor its commitments to espionage agents and to adopt fair internal procedures for dealing with their grievances. U.S. Br. 21.

Respondents also seriously err in arguing that the United States' conduct in litigating this case demonstrates the need for the judiciary to superintend how the CIA internally handles grievances by alleged former spies. Br. 38-44. Contrary to respondents' assertion, the United States has correctly and consistently maintained that no law or regulation provides respondents (or any other alleged spy) with a judicially enforceable entitlement to compensation, lifetime or otherwise. Such an entitlement would fly in the face of the Exe-

cutive's history of compensating spies in utter secrecy, and the paramount interest of the United States in conducting its clandestine operations, particularly the manner of recruiting, compensating, and terminating spies, in absolute secrecy.

The United States also has not, contrary to respondents' contention, misrepresented in these proceedings the significance of "PL-110," which the government accurately explained to the district court refers to 50 U.S.C. 403h. See Resp. Br. 39. Section 403h merely displaces otherwise applicable immigration requirements with respect to persons whose entry into this country the United States has determined will further national security or is essential to the Nation's intelligence mission. 50 U.S.C. 403h. The terms of the statute, however, are silent with respect to spies, much less whether they are owed compensation or a minimal level of Executive Branch process.

Respondents also point to redacted regulations of the CIA, which state that CIA's "financial support for [redacted] should cease as soon as possible" but that the CIA "may" provide support for lengthy periods "if [redacted] determines that such support is necessary." Br. 42 (emphasis omitted). Respondents similarly cite a 1988 letter from the CIA to the Department of Justice concerning persons who enter the country under Section 403h, stating that the CIA "believes it has an obligation to support each of its [redacted] for a reasonable period of time" and that its commitment "may be for life" "based upon unique circumstances." *Ibid.* (emphasis omitted). Those passages in no way represent a legal commitment to provide a specific level of financial support to espionage agents, much less a conferral of private, judicially enforceable rights to obtain any particular level of support. Moreover, even if the Executive decides to make certain procedures available to espionage agents, a claimed spy cannot obtain a judicial declaration that he is entitled to compensation under such procedures without running afoul

of *Totten*. Likewise, it is difficult to imagine what standards judges could apply to assess the adequacy of such internal procedures.

Far from demonstrating the need for judicial intervention in this case, this suit illustrates why respondents' complaint should have been dismissed *at the outset*. The temptation to reveal a little information about Executive Branch procedures in general in order to obtain a dismissal in a particular case will often lead to the disclosure of sensitive information when the entire suit is premised on a secret espionage agreements. Subtle differences in how the Executive Branch responds can provide clues to foreign governments as to whether the allegations have any merit. The far better course is to dismiss such suits at the outset in recognition that the risks of disclosure and the nature of the agreement justify a rule of dismissal.

C. Because Respondents' Suit Cannot Proceed Without Disclosing The Secret Fact Of Whether Respondents Were Espionage Agents, The CIA Need Not Formally Assert And Establish The State Secrets Privilege

1. Reynolds *does not supersede* Totten

Respondents argue that *Reynolds*, *supra*, supplants *Totten*, presumably even on its own facts, because the Court in *Reynolds* cited *Totten* as an example of a "privilege" that protects military secrets. Br. 26-27 (citing *Reynolds*, 345 U.S. at 6-7, 11 n.26). The Court's discussion in another passage of *Reynolds*, however, makes clear that *Totten* continues to impose a *categorical* rule of dismissal with respect to suits alleging compensation claims by espionage agents. Thus, the Court explained that, "where the very subject matter of the action," is "a contract to perform espionage," *i.e.*, "a matter of state secret," *Totten* requires dismissal "*on the pleadings without ever reaching the question of evidence*,

since it [is] so obvious that the action should never prevail over the privilege." 354 U.S. at 11 n.26 (emphasis added).

The above passage establishes that the Court did not contemplate that the CIA would need to assert and establish an evidentiary state secrets privilege when the plaintiff's complaint on its face shows that the suit is premised on an agreement for espionage services. Thus, regardless of whether *Totten* is viewed as a substantive rule that suits based on secret espionage agreements are necessarily barred by the very nature of the undertaking, or as a "privilege" against litigating certain claims, or as a prophylactic rule that protects state secrets, it clearly operates as a jurisdictional bar to complaints "where the very subject matter of the action [is] a contract to perform espionage." 354 U.S. at 11 n.26. Indeed, since *Reynolds*, the Court has explained that *Totten* poses a categorical bar that "'forbids the maintenance of any suit'" to recover on a claim whose essential element is a classified fact that is beyond "judicial scrutiny." *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146 (1981) (quoting *Totten*, 92 U.S. at 107)). No formal assertion of the state secrets privilege is necessary in such instances, because it is clear on the face of the plaintiff's complaint that the suit cannot proceed without forcing the United States to confirm or deny a classified fact. *Id.* at 146-147.

Respondents thus err in arguing that *Reynolds* requires district courts to determine that on a case-by-case basis a suit such as respondents' would jeopardize national security, Br. 12, 14, 25-26, 32-33, and in relying on the conclusion of the district court and the court of appeals that respondents' suit may proceed without necessarily disclosing national security information. *Reynolds* did not free up lower courts to ignore *Totten*. To the contrary, this Court in *Reynolds* reaffirmed *Totten*'s judgment that "public policy forbids the maintenance of any suit in a court of justice" that is premised on an alleged espionage relationship. 92 U.S. at 107. Only by

ignoring the very holding of *Totten* could the court of appeals conclude that respondents' "have so far proceeded in a manner that has not breached" "any secrecy promise implicit in the agreement." Pet. App. 22a.

Respondents are similarly mistaken in suggesting that other courts of appeals have recognized the abrogation of *Totten*. Br. 26-29. The Ninth Circuit stands alone in that respect. The decisions cited by respondents are all inapposite; none of them holds that *Reynolds* supersedes *Totten* in cases governed by *Totten*, and indeed, none involves a suit by an alleged spy.[1]

Respondents also cite decisions in which courts have invoked *Totten* to dismiss suits only after the state secrets privilege has been formally asserted.[2] None of those cases, however, involved a case of the class governed by *Totten*—a

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[1] *Monarch Assurance P.L.C.* v. *United States*, 244 F.3d 1356, 1360 (Fed. Cir. 2001), was a suit by a company seeking to address a breach of promise *by* an alleged spy on behalf of the Agency, and the issue of whether *Totten* would apply in those circumstances was not before the court of appeals since the United States already had validly asserted the state secrets privilege. *Air-Sea Forwarders, Inc.* v. *United States*, 166 F.3d 1170, 1171-1172 (Fed. Cir. 1999), held that a settlement agreement barred a suit by a CIA contractor—an entity whose relationship with the CIA was not secret. The court did not reach the issue whether *Totten*—as opposed to the settlement agreement—barred the suit and accordingly did not consider whether the government was required to assert a state secrets privilege. *Clift* v. *United States*, 597 F.2d 826, 830 (2d Cir. 1979), held that the district court erred in invoking *Totten sua sponte* in a suit by a patentee that did not have any contract (much less a secret one) with the government. Finally, *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 271 (4th Cir. 1980), rejected a government official's argument that *Totten* required dismissal in a case brought by a government employee where the state secrets privilege had already been asserted before the case reached the court of appeals.

[2] *McDonnell Douglas Corp.* v. *United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003); *Kasza* v. *Browner*, 133 F.3d 1159, 1166, 1170 (9th Cir.), cert. denied, 525 U.S. 967 (1998); *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544, 547-548 (2d Cir. 1991); *Fitzgerald* v. *Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1241-1242 (4th Cir. 1985).

suit by an alleged spy seeking redress for the government's failure to compensate the spy—and none of the decisions presented the question of whether, in that class of cases, *Totten* compels the dismissal of the complaint.

2. Reynolds *does not adequately protect the CIA's interests in keeping espionage agreements secret*

As discussed, because adjudication of respondents' suit necessarily would be based on the existence of a secret agreement and would entail adjudication of the classified fact of whether respondents were spies, there is no basis for requiring the CIA to assert the state secrets privilege on a case-by-case and evidence-by-evidence basis. Such a regime not only would be entirely unnecessary; it would also pose significant and unjustified costs on the Director of Central Intelligence and seriously increase the risk of disclosure of classified information as well as "graymail" payments by the Agency in order to prevent suits by spies with perceived grievances against the CIA. U.S. Br. 32-34.

Respondents also err in arguing that their suit poses no danger to national security because they have proceeded by using pseudonyms without disclosing their identities or the details of their alleged activities overseas. Br. 17, 29. The objection to the suit in *Totten* extended well beyond the revelation of William Lloyd's name and his allegation that he spied for President Lincoln during the Civil War. The objection was to the filing of the suit that sought relief that conflicted fundamentally with the very nature of the alleged secret agreement and the government's interest in conducting espionage operations. 92 U.S. at 106-107.

Respondents also argue that "it is uncontested that [respondents'] complaint and other public filings allege no classified facts" because the CIA has reviewed respondents' pleadings before they were filed. Br. 12; see also Br. 1, 28, 30. The CIA has conducted a pre-filing review, however,

merely to ensure that respondents' counsel, to whom the CIA has granted a limited security approval and has granted access to classified information, do not file documents in open court that make "allegations that, regardless of their truth, would threaten the national security or the safety and well-being of innocent persons," such as the naming of "a specific individual to be a CIA officer." Pet. App. 146a (Declaration of William H. McNair, Information Review Officer for Directorate of Operations).

The CIA's review, however, does not confirm the truth of respondents' allegations. Nor does it change the fact that forcing the Agency to answer respondents' complaint (or permitting a court to decide the issue) would reveal whether respondents actually had a past espionage relationship with the CIA. As set forth in the opening brief, any confirmation or denial of respondents' allegations by the CIA is classified because the Agency's response would reveal highly sensitive information about the existence and identities of espionage agents as well as the CIA's tradecraft methods in conducting espionage operations. U.S. Br. 34-36. The Court's holding in *Totten*, as recognized in *Reynolds*, confirms that respondents' alleged espionage relationship with the CIA, if confirmed or denied by the CIA, would be a state secret.[3]

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[3] Respondents allege (Br. 3-8, 17, 38-39 & n.24, 43-44), that the CIA has privately acknowledged the existence of a relationship with respondents. But the Agency has never confirmed or denied the truth of respondents' allegations. For instance, respondents quote a letter allegedly from CIA personnel (see Br. 3-4), but that letter on its face does not purport to be from the CIA (see Br. in Opp. App. 16-17). Similarly, respondents assert that their counsel encountered difficulties in dealing with the CIA, see Br. 4-8, 43-44, but those assertions are all based on unconfirmed allegations contained in respondents' complaint or an affidavit prepared by respondents' counsel. See Pet. App. 129a-133a; Br. in Opp. App. 18-23. It would be ironic, indeed, were respondents' mere allegations that the CIA has acknowledged an espionage agreement with respondents to furnish a basis for compelling the CIA to publicly confirm or deny those allegations.

Respondents also are fundamentally mistaken in assuming that their suit could be fully adjudicated without the public disclosure of classified information. Br. 17, 30. The only way that respondents could prevail on their claims is to have a completely *sealed* trial in which respondents would prove that they were spies and that the CIA made enforceable promises to them. The proceeding would then presumably result in a *sealed* judgment that awarded respondents a specific level of compensation and that ordered classified procedures for the CIA to follow in resolving compensation disputes by espionage agents.

In the first place, the very fact that respondents must contemplate such extraordinary proceedings to maintain the confidentiality of classified information only underscores that their claims are premised on a secret agreement and a classified fact and that their case cannot proceed without some disclosure—even if only to court personnel or a finder of fact—of classified information. Of course, the same arrangements could have been made in *Totten*, but this Court adopted a rule of dismissal, not the option of wholly closed, secret proceedings.

Moreover, respondents' argument proceeds on a fundamental misunderstanding of the balance that is struck by *Totten* and *Reynolds* in the context of civil litigation. Respondents do not dispute that *Reynolds* mandates outright dismissal—not wholly closed proceedings—of even constitutional claims if the case cannot proceed on the merits without the classified information. *Reynolds*, 345 U.S. at 11; U.S. Br. 42 & n.4. Thus, the effect of the state secrets privilege "is completely to remove the evidence from the case. * * * [T]he evidence is simply disregarded." *In re United States*, 872 F.2d 472, 476 (D.C. Cir.), cert. denied, 493 U.S. 960 (1989). In other words, both *Totten* and *Reynolds* proceed on the assumption that the proper response to classified information in civil litigation is to disregard the classified

information, not to order its partial disclosure to court personnel and/or the finder of fact and closure of the proceedings to prevent *further disclosure*. Here, as discussed, at 13-15, *supra*, there is no basis for requiring the United States formally to assert the state secrets privilege because the complaint demonstrates that respondents cannot prevail on their claims without proof of an espionage agreement and the details of that agreement. In cases like this and *Totten*, because "it [is] so obvious that the action" cannot proceed without the use of a secret fact, *Reynolds*, 345 U.S. at 11 n.26, the suit simply must be dismissed.

* * * * *

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed, and the case remanded with instructions to dismiss the complaint.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

DECEMBER 2004